Petition

81-1900

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD K. HILLIS,
Petitioner,

v.

STEPHEN F. AUSTIN STATE UNIVERSITY,
and
CREIGHTON DELANEY,
in his individual and official capacities,
Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER, UNDER CONSTITUTIONAL AND TRADITIONAL NOTIONS OF ACADEMIC FREEDOM, A STATE UNIVERSITY PROFESSOR MAY BE TERMINATED FOR RESISTING, CRITICIZING, AND CALLING THE UNIVERSITY ADMINISTRATION'S ATTENTION TO HIS DEPARTMENT CHAIRMAN'S MANDATE THAT HE ENTER, IN VIOLATION OF UNIVERSITY POLICY, A GRADE FOR A STUDENT WHO NEVER ATTENDED CLASS AND WHOSE WORK THE PROFESSOR HAD NEVER SEEN.

2. WHETHER A UNITED STATES COURT OF APPEALS, HAVING BEGUN TO HEAR ORAL ARGUMENT, MAY IN THE ABSENCE OF UNUSUAL CIRCUMSTANCES RAISE A SUFFICIENCY OF EVIDENCE POINT NEITHER ASSIGNED NOR ARGUED BY APPELLANTS AS ERROR, REQUEST SUPPLEMENTAL BRIEFS ON SUFFICIENCY OF EVIDENCE, PROCEED TO ACCEPT WITH APPELLANTS' SUPPLEMENTAL BRIEF A FURTHER NEW UNASSIGNED POINT OF ERROR, AND ADOPT FROM THIS SUPPLEMENTAL BRIEF NEW CONCLUSIONS OF FACT DRAWN FROM SELECTED TRANSCRIPT PAGES APPENDED TO THE SUPPLEMENTAL BRIEF BUT CONTRADICTED BY THE RECORD AS A WHOLE.

3. WHETHER UNDER THE CIRCUMSTANCES OF THIS CASE, WHICH WAS REVIEWED SOLELY UPON TESTIMONIAL EVIDENCE, THE COURT

OF APPEALS WAS CORRECT IN REASSESSING THE CREDIBILITY AND DEMEANOR OF WITNESSES, DRAWING NEW INFERENCES UPON AND RE-WEIGHING THE EVIDENCE, AND REVERSING THE DISTRICT COURT UNDER THE "CLEARLY ERRONEOUS" RULE AND UNDER THE BURDENS ANALYSIS OF *MT. HEALTHY CITY BOARD OF EDUCATION V. DOYLE*, 429 U.S. 274 (1978).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	III
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS ACTION	2
STATEMENT OF THE CASE: MATERIAL FACTS	3
STATEMENT OF THE CASE: BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT AND COURT OF APPEALS	6
REASONS FOR GRANTING THE WRIT	7
APPENDIX A: ORDERS AND OPINIONS BELOW	A1
APPENDIX B: CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND OTHER AUTHORITY	B1

TABLE OF AUTHORITIES

CASES	Page
Ahern v. Board of Education, 456 F.2d 399 (8th Cir. 1972)	21, 24
Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 276 (1972)	22
Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1979)	23
Board of Regents v. Roth, 408 U.S. 564 (1972)	26
Connelly v. University of Vermont, 244 F. Supp. 156 (D. Vt. 1965)	23
Croy v. Campbell, 624 F.2d 709 (5th Cir. 1980)	14
Dehaan v. Brandeis University, 150 F. Supp. 626 (S.D. Mass. 1957)	23
Dickens v. U.S., 545 F.2d 886 (5th Cir. 1977)	8
Edde v. Columbia University, 168 N.Y.S.2d 643 (Sup. Ct. 1957)	23

CASES

	Page
General Finance Loan Co. v. General Loan Co., 163 F.2d 709 (9th Cir. 1947)	15
Givhan v. Western Line Consolidated Independent School District, 439 U.S. 410 (1979)	24
Government of the Canal Zone v. P. (Pinto), 590 F.2d 1344 (5th Cir. 1979)	12
Graves v. Walton, 410 F.2d 1153 (5th Cir. 1969)	21
Gulf Banana Co. v. Reefer Shipping Co., 391 F.2d 287 (5th Cir. 1969)	11
Harris v. Plastics Mfg. Co., 617 F.2d 438 (5th Cir. 1980)	15
Hillis v. Stephen F. Austin State University, 486 F. Supp. 663 (E.D. Tex. 1980)	2
Hillis v. Stephen F. Austin State University, No. 80-1570, Slip Op., Federal Reporter (Second Series), 14103-09 (5th Cir., January 11, 1982)	2
Kapreilan v. Texas Woman's University, 509 F.2d 133 (5th Cir. 1975)	24
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	19, 20
Keys v. Sawyer, 353 F. Supp. 936 (S.D. Tex. 1973), *aff'd*, 496 F.2d 876 (5th Cir. 1974)	23
Lai v. Board of Trustees of East Carolina University, 330 F. Supp. 904 (E.D. N.C. 1971)	23
Liberty Mutual Ins. Co. v. Thompson, 171 F.2d 723 (5th Cir. 1949)	12
Magidson v. Duggan, 212 F.2d 748 (8th Cir. 1954), *cert. denied*, 348 U.S. 883, *reh. denied*, 348 U.S. 922 (1955)	11, 12
Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971)	20
Movable Offshore, Inc. v. The M/V Wilken A Falgout, 471 F.2d 268 (5th Cir. 1973)	8
Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977)	8, 12, 14, 16, 18
Near v. Minnesota, 283 U.S. 697 (1931)	20
Olgin v. Darnell, No. 80-2241, Slip Op., Federal Reporter (Second Series), 415-17 (5th Cir., December 18, 1981)	11
Palmer v. Board of Education, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980)	21
Perry v. Sinderman, 408 U.S. 593 (1972)	19
Pickering v. Board of Education, 391 U.S. 563 (1968)	12, 24
Regents of the University of California v. Bakke, 438 U.S. 265 (1978)	19
Slaughter v. Brigham Young University, 514 F.2d 623 (10th Cir. 1975)	22
Sweezy v. New Hampshire, 354 U.S. 234 (1957)	19
U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)	11

CASES — Page

U.S. v. United States Gypsum Co., 333 U.S. 364 (1948) .. 16
U.S. v. Yellow Cab Co., 338 U.S. 338 (1949) 8
University of Miami v. Militana, 184 So.2d 701 (Fla. App. 1966) 22
Webb v. Frisch, 111 F.2d 887 (7th Cir. 1940) 8
Webb v. Lake Mills Community School District, 344 F. Supp. 791 (D. Iowa 1972) 20
Western Cottonoil Co. v. Hayes, 218 F.2d 158 (5th Cir. 1954) 16
Wiemann v. Updegraaf, 344 U.S. 183 (1952) 19
Williams v. Board of Regents of the University System of Georgia, 629 F.2d 993 (5th Cir. 1980) 22
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 12

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendments I, IX, and XIV § 1 2

FEDERAL STATUTES

28 U.S.C. § 1343(3) 2, 3, 7
28 U.S.C. § 2072 (F. R. Civ. P. 52(a) 3, 8, 11
42 U.S.C. § 1983 ..... 2, 3, 7

REGULATIONS

Stephen F. Austin State University Faculty Handbook, No. 7 (1973) 3, 21

OTHER AUTHORITY

D. Robertson, "The Overprotected Professors," *Newsweek*, February 15, 1982, at 17 26
J. Underwood, "Student Athletes: The Shame, the Sham," *Sports Illustrated*, May 19, 1980, at 36 22

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Petition For Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Richard K. Hillis, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in *Hillis v. Stephen F. Austin State University,* No. 80-1570, on January 11, 1982.

OPINIONS BELOW

The opinion *Hillis v. Stephen F. Austin State University,* issued by the United States District Court for the Eastern District of Texas, is reported at 486 F. Supp. 663 (E.D. Tex. 1980) and included in Appendix A hereto, pages A13 - A32. The opinion *Hillis v. Stephen F. Austin State University,* issued by the United States Court of Appeals for the Fifth Circuit, Unit A, on January 11, 1982, is reported as a Slip Opinion for the *Federal Reporter* (Second Series), pages 14103-09, and included in Appendix A hereto, pages A2 - A12.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was entered on January 11, 1982. (The Fifth Circuit does not record hour of entry.) Petition for rehearing en banc was denied on February 4, 1982 (*see* Appendix A, page A1). The jurisdiction of the Supreme Court of the United States is invoked under Article III, Section 2, Clause 1 of the United States Constitution, 28 U.S.C. § 1331 (federal question), 42 U.S.C. § 1983 (surrender of constitutionally protected rights as a condition of employment), 28 U.S.C. § 1343(3) (civil rights and elective franchise), Amendments I, IX, and XIV of the United States Constitution (liberty of academic expression and evalution), United States Supreme Court Rule 17 (Jurisdiction on Writ of Certiorari), and 28 U.S.C. § 1254(1) (review of Court of Appeals by Writ of Certiorari).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Involved in this case are the United States Constitution, Amendments I, IX, and XIV (set out in Appendix B

at page B1); Title 28, United States Code, Section 1343(3) (set out in Appendix B at page B2); Title 42, United States Code, Section 1983 (set out in Appendix B at page B2); and Federal Rule of Civil Procedure 52(a) (set out in Appendix B at page B2). Regulations involved in this case are contained in the *Stephen F. Austin State University Faculty Handbook*, No. 7 (1973) (set out in Appendix B at pages B3 - B5).

STATEMENT OF THE CASE

Material Facts

Richard K. Hillis ("Hillis"), petitioner in this civil rights action, began serving as a non-tenured assistant professor of Art at Stephen F. Austin State University ("SFA") on August 23, 1974. The SFA Art department was then undergoing a change from the orientations of a teachers' college to those of a major university. Hillis was hired as part of this transition because he held the Doctorate of Arts in studio art and had a prodigious record of publications and honors in national refereed exhibitions.

The SFA Art department is funded by the State of Texas in direct ratio to hours of student enrollment. The department chairman, Dr. Creighton Delaney ("Delaney"), a co-defendant in this case, engaged in an unauthorized practice of simultaneously padding enrollment hours and luring students to the Art major by granting "advance placement" credits—both hours and grades—to students who were never instructed or called upon to demonstrate any proficiency or work completed. Petitioner Hillis' difficulties with his chairman commenced with, and were sustained by, his criticism of and refusal to participate in this academic scam.

Hillis received on the sixth day of his first semester at SFA the following note: "*Dick* Miss Kelly Perkins has received advanced credit for Art 300-01 from studies at another institution. Carry her on your roll with a grade of 'B'. /s/ C. H. Delaney." Hillis entered Miss Perkins on the roll for his junior (300) level painting course; he had reservations about the grade, however, and after Miss Perkins never appeared in class nor turned in any work, Hillis in early December, before final exams began, went to Delaney and stated he had nothing upon which to base a grade for Miss Perkins. Delaney, after some difficulty in remembering who Miss Perkins was, repeated his direction that Hillis give her a "B" and said he had assessed her work. Hillis suggested Delaney give her the grade; Delaney replied he could not, and that Hillis had him "on the spot." Hillis counterproposed. He would be comfortable as warrantor and mentor of the student's performance, and of what she should learn and master, if she would submit a portfolio for his assessment. Until that time he would enter a "WH," or "grade withheld." Delaney agreed.

Hillis turned in the "WH" grade, believing Delaney would eventually send the student or her work to him. Delaney was not so forthcoming; he went to the registrar's and changed the "WH" to a "B." Only later, through pretrial discovery, would Hillis learn Miss Perkins had never shown any portfolio or work to Delaney. Delaney had granted her advance placement in the junior-level painting course, on the strength of a collage-making class she had taken at Skyline High School in Dallas.

Delaney took this "grading incident" into close account. He admitted at trial it was a "factor" or an "instance"

he considered in deciding Hillis was "uncooperative" and should not have his contract renewed. Delaney pursued the matter of terminating Hillis with Dean Turner of the College of Fine Arts, who like Delaney was a liberal grantor of advance placements. At trial, Turner admitted the "grading incident" was "substantial" in Delaney's decision to terminate Hillis.

Because of the "grading incident," however, the "uncooperative" Hillis was soon placed in other distresses. During the second week of the new Spring semester, while he was away from campus for three days on university-approved leave to attend a conference, Hillis was removed from teaching Art 550G, a graduate course in research methods, and he was told initially by Delaney that his teaching methods were unacceptable. Hillis' method, though new to SFA, was one commonly practiced in the nationally-ranked art programs where Hillis had taught or studied before. It consisted of organizing the class into small groups to prepare and cross-evaluate formal research proposals, using slides of work the students thought worthy of getting grants from foundations.

Hillis sought the advice of the SFA Chapter of the American Association of University Professors ("AAUP") about his removal from Art 550G. On their advice he appeared at the third-week meeting of the class, to show himself ready to teach. Hillis duly left, before the class started, when asked to do so by Delaney, who had assumed the teaching of the class.

Hillis then sought a formal meeting with Delaney about his removal from Art 550G, and to this meeting, on January 28, 1975, he brought an AAUP representative, whose presence, Delaney admitted at trial, made Delaney

"suspicious." At this formal meeting, Delaney told Hillis that his uncooperativeness was the reason for the removal from Art 550G. Pressed for any specific incident of Hillis' uncooperativeness, Delaney could only cite one—the grading incident. And here Delaney revealed he had gone to the registrar's and changed the "WH" to a "B".

Hillis promptly wrote the SFA Chapter of the AAUP about the grade change, and he took an AAUP representative with him to meet with Dean Turner, on February 4, 1975, to protest the infringement of his academic freedom in both the grading incident and the removal from Art 550G. On the day after his meeting with Turner, Hillis received a certified letter, dated February 4 and written by Turner but signed by Delaney, stating he would not be reappointed beyond the first year. The letter gave no reason for his termination.

Dr. Hillis then exhausted—surrepetitiously—channels of redress within the university. He appealed to a higher dean, and to the university president; twice he asked for a hearing from the Faculty Senate, only to be rebuffed with the response that because he was untenured he had no right to a hearing. Finally a Fine Arts Council committee was appointed to assess whether his academic freedom had been violated. This committee was advised, even before its work began, that "lower courts don't reverse appellate courts" and that none of their fiindings could affect the decision to terminate Hillis.

Jurisdiction In The District Court And Court Of Appeals

Federal jurisdiction lies because Stephen F. Austin State University performed a state action in terminating

Dr. Hillis' public employment for exercising his First Amendment rights. A federal question, 28 U.S.C. § 1331, is reached under 42 U.S.C. § 1983, since respondent Delaney, a person acting under color of state law, regulation, and usage, deprived Hillis, a citizen of the United States, of public employment for a constitutionally impermissible reason. Petitioner claims a right to redress in the District Court under 28 U.S.C. § 1343(3) and has suffered damages, exclusive of interest and costs, of $87,545.00 in lost salary, which in good faith he attempted to mitigate by earning $18,699.43 as a manual laborer and by writing 286 letters of application, over four years, to art-related employers. Petitioner has also exhausted every channel of administrative relief that might have been afforded by SFA, and was twice notifed by SFA to that effect. Jurisdiction in the Court of Appeals lay under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The action of the Court of Appeals in reversing the District Court's verdict for Dr. Hillis was contrary to three of the general considerations of United States Supreme Court Rule 17:

I. The Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.

1. The reversing panel of the Court of Appeals rejected precedent by ignoring the District Court's (a) findings of fact, (b) conclusions as to witness credibility, (c) weighings of and inferences upon the evidence, and (d) correct application of the applicable law. As to all these matters,

as more fully explained below, the Court of Appeals indulged in second-guessing and the most arbitrary speculation.

(a). The District Court was entitled, as a matter of procedural regularity and as renderer of an exemplary factfinding task, to the deference that is by law and design accorded to an impartial federal trial court. The "clearly erroneous" standard of F. R. Civ. P. 52(a) does not create or enlarge discretion in a Court of Appeals to set aside findings of fact. *Webb v. Frisch,* 111 F.2d 887 (7th Cir. 1940). It is not an appellate function to retry a case, nor to supplant the trial court's constructions and resolutions of ambiguity. *Dickens v. U.S.,* 545 F.2d 886 (5th Cir. 1977). The reviewing court should not ask whether it would have found otherwise, but whether the trial court could permissibly have found as it did. *Movable Offshore, Inc. v. The M/V Wilken A. Falgout,* 471 F.2d 268, 271 (5th Cir. 1973). Where evidence conflicts, the trial court's decision to weigh one side more heavily is not to be disturbed on appeal. *U.S. v. Yellow Cab Co.,* 338 U.S. 338 (1949). In the case at bar, the District Court deliberated seven months before issuing its verdict. Trial took up two days. The transcript filled out nearly 500 pages, and discovery over four years had yielded more than 125 sets of documents. The trial court's opinion, 486 F. Supp. 663, carefully separates findings of fact (four columns) and conclusions on the merits including weight of the evidence (five further columns). Judge Parker knew the case so well he was able to categorize the evidence deftly. He was obliged, in following *Mt. Healthy City School District v. Doyle,* 429 U.S. 274 (1977) as the controlling law of the case, to maintain a category for evidence of protected conduct, and a category

for evidence of unprotected conduct which might have furnished reason to terminate Hillis. This Judge Parker did, and as to the latter category he concluded there was "no evidence" to show there had been a sufficient, non-protected reason to terminate Hillis. Importantly, Judge Parker observed other categories of evidence: that which was worthy and not worthy of credibility, and here the judge's assessments went heavily against defendant Delaney. The appellate panel undid this work. The undoing was achieved by passing lightly over the credibility issue, by counting up general and unsupported aspersions against Hillis quantitatively rather than qualitatively, and by labeling, arbitrarily and without analysis, Hillis' protected activities as "plain insubordination."

(b). The trial court's conclusions as to the demeanor, veracity, and credibility of witnesses should have been unassailable, as a rule of law. The trial court took an active part in the questioning of every witness, and was moved to characterize testimony from Delaney, bearing upon whether the decision to terminate Hillis was reached before or after the "grading incident," as "generally not worthy of belief insofar as it is uncorroborated and may be the product of fabrication." 486 F. Supp. at 667, n.4. Delaney's testimony was contradicted by the witness Kelly Perkins, who affided he had never seen her portfolio, never had any long interviews with her, and never held out any understanding that she was to get a "B" or any advance placement in the painting course. The trial court's footnote 3, 486 F. Supp. at 665, points out a lie in Delaney's memo to Hillis—that Kelly Perkins had received credit from another institution. Delaney's own testimony yielded other discrepancies. He said he had decided to fire Hillis in December, yet he evaluated Hillis in January

—seemingly quite a purposeless act. Delaney, supposedly a chairman wishing to be rid of an undesirable faculty member, was unfittingly silent in January when Hillis attended the College Art Association Meeting, which housed the national job market; he gave Hillis no indication he should look for another job at that meeting. Delaney shifted among conflicting explanations for removing Hillis from Art. 550G: besides retaliation for the "grading incident," there were doubts as to Hillis' teaching method, fears the heavily-enrolled course would not 'make" the required minimum of five students, unidentified complaints, and unexplained staffing logistics. Perhaps most probative of Delaney's poor credibility was his evasiveness about his own credentials: cross-examination revealed that his entre training in Art consisted of twelve hours at an unaccredited undergraduate school, and that he was unable to recall the title or specific subject matter of his own dissertation. Delaney insisted his advance placement practices were authorized, though he could point to no published university rule or official regulation allowing them. It was against this background of testimony that the trial court observed in contrasting Hillis to Delaney, "the new wave refused to compromise his integrity to give way to the old." 486 F. Supp. at 665.

The trial court's controlling observations upon witness veracity were footnoted by the appellate panel, Slip Op. at 14106 n.4, and promptly discredited. The discrediting rested on nothing more than the panel's conclusion that the trial judge had spoken nonsense when concluding it was "ironic" that Delaney had fired Hillis. *Id.*, n.4. What the trial judge had actually found ironic, was that Delaney had *hired* Hillis. 486 F. Supp. at 665.

Equally egregious was the appellate panel's exclusive use of *oral testimony* from the trial to overturn the District Court's verdict. The words "testimony" and "testified" recur in the panel opinion twenty-six times. Appellate references to what witnesses "stated," "insisted," believed," or "attributed," have a like frequency. This was a gross usurpation of trial court function and a flagrant abuse of the "clearly erroneous" standard. As Learned Hand stated,

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can profitably be said is that an appellate court . . . will reverse . . . most reluctantly and only when well persuaded. . . . [But] whatever may be said in favor of reversing a trial judge's findings when he had not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they "must be treated as unassailable."

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945). *Accord, Olgin v. Darnell,* No. 80-2241, Slip Op. 415-17, *Federal Reporter* (Second Series) (5th Cir., Dec. 18, 1981) (Clark, J.): "A court of appeals has neither permission nor prerogative to reappraise the credibility of witnesses." *See also Gulf Banana Co. v. Reefer Shipping Co.,* 391 F.2d 287 (5th Cir. 1969). The plain mandate of F.R. Civ. P. 52(a) is, "due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

The rule a District Court must follow, once it deems a witness not credible, is plain. As to the suspect testimony itself, "giving of false testimony is substantive proof of nothing." *Magidson v. Duggan,* 212 F.2d 748, 759

(8th Cir. 1954), *cert. denied,* 348 U.S. 883, *reh. denied,* 348 U.S. 922 (1955). And "an orally testifying witness' demeanor is always assumed to be in evidence as wordless language." *Government of the Canal Zone v. P. (Pinto),* 590 F.2d 1344, 1348 (5th Cir. 1979). As to the same witness' other testimony, the trial court has discretion to reject some or all of it. *Liberty Mutual Ins. Co. v. Thompson,* 171 F.2d 723 (5th Cir. 1949). Had the appellate panel accorded unusual and fitting deference to the trial court in this case, the panel would have realized an obvious connection between the trial court's comments on witness honesty, which suffused the opinion, and the trial court's conclusions in two places, 486 F. Supp. at 667 and 668, about the paucity of evidence offered by defendants. The Court of Appeals, however, chose to resurrect the unbelievable.

(c). The trial court is in a superior position to appraise and weigh evidence. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100 (1969). The District Court weighed carefully all testimony and documentary material proffered by the parties and concluded, "plaintiff successfully carried his *Mt. Healthy* burden," while the university had failed to meet its *Mt. Healthy* burden. 486 F. Supp. at 667. This was a correct application of the *Mt. Healthy* doctrine, 429 U.S. at 287. The District Court also weighed the evidence in the light of *Pickering v. Board of Education,* 391 U.S. 563 (1968), since defendants claimed Hillis' conduct had been so "abrasive" and "disruptive" as to justify his termination. The trial court found "no evidence" that Hillis' speech or conduct concerning the grading incident, his AAUP representation, and his protest of removal from Art 550G, were so disruptive. As to unprotected activities which might have

furnished cause for termination, the District Court heard repeated, vague, and conclusory accusations that Hillis was "abrasive" and "a problem." The trial court did not close the door on these general accusations, but left the way open, over objections from Hillis' counsel, for some underlying substance for the accusations to be developed by SFA. No such underlying substance was ever forthcoming. Delany's secretary, for instance, alleged Hillis had upset her by using "filthy language" in her presence. She could not remember any single word he had used. Still worse for SFA, instances of specific "proof" of Hillis' abrasiveness turned out to be protected speech—a pathetic reflection upon the understood breadth of academic freedom at SFA. The defense witness Dr. R. K. Waters, for instance, charged Hillis, while serving on a grant reviewing committee, had been "abusive" to a mediocre applicant. The actual substance to this charge was that Hillis had asked the applicant what he meant by the word "paradigm" in his grant proposal. Delaney, asked on direct examination for instances of "uncooperativeness" on Hillis' part, other than the grading and course removal incidents, stated that Hillis' "philosophies" were incompatible with his own, and that Hillis would go "overboard on ideas." Delaney had relayed these discomfitures to Dean Turner when he "requested that we not renew [Hillis'] contract."

A sole incident of unprotected conduct stood out at trial: Hillis had been unable to requisition a bulb for his projector, used in his classes, and with a newcomer's unawareness he purchased one in the business district and submitted his receipt to the department secretary. Delaney conceded at trial this event was "a little minor thing." The trial judge concluded, "the incident and Dr. Delaney's

description of it would not justify the conclusion that non-renewal would have occurred as a result of this transgression." 486 F. Supp. at 667. To the Fifth Circuit panel, however, the bulb incident blinked in a much different color: "Hillis' actions in flaunting proper procedures furnished another example of his lack of cooperation." Slip Op. at 14107. The trial court's inferences were nullified despite the Fifth Circuit's own precedent that an appellate court "must give great weight to the findings made and inferences drawn by the trial judge." *Croy v. Campbell,* 624 F.2d 709, at 711 n.1 (5th Cir. 1980).

(d). The Fifth Circuit panel also held that the District Court misapplied the facts of this case to the *Mt. Healthy* doctrine. That assertion was a bald mistake, if not a conscious pretext for re-weighing the evidence. The District Court frequently and repeatedly advised counsel to confine questioning to matters relevant to the *Mt. Healthy* decision. The trial court's opinion tracks *Mt. Healthy's* distribution of plaintiff and defendant burdens scrupulously and punctiliously. Hillis was found to have carried his burden; Delaney and SFA were found to have failed to carry theirs. Surely *Mt. Healthy* does not re-write Rule 52(a), the "clearly erroneous" standard, or the trial judge's duties to observe witness demeanor, assess credibility, make inferences upon the evidence, and apply the preponderance test in civil cases.

2. The Fifth Circuit panel's very methods of review were so irregular as to indicate bias in favor of defendants SFA and Creighton Delaney. Defendants were not merely the beneficiaries of enormous latitude in the application of F. R. Civ. P. 52(a). Defendants had not even thought to raise sufficiency of the evidence as a ground of appeal. (This in itself indicated the weight of the evidence below).

Once oral argument had begun on appeal, however, Justice Clark, without consulting the other panel members, interrupted appellants (the Texas Attorney General) to ask if sufficiency of evidence had been considered as a point of assigned error. The Attorney General was alertly non-commital, whereupon Justice Clark ordered a supplemental brief on evidentiary sufficiency. This was a gross abuse of appellate power. It is so basic a rule as to be commonplace, that issues not raised on appeal are abandoned. *Harris v. Plastics Mfg. Co.*, 617 F.2d 438 (5th Cir. 1980). No exceptional circumstances justified revival of an abandoned issue. Plain error was not on the face of the record, nor was manifest miscarriage of justice about to occur. *See General Finance Loan Co. v. General Loan Co.*, 163 F.2d 709 (9th Cir. 1947). The Attorney General, with resources equivalent to those of the largest law firms in Texas, had had ample time to prepare its appeal. Hardship, if it ran to anyone, was Hillis'. He had beseeched every administrative authority at SFA, without avail, to recognize he had been terminated for refusing to give an unlawful grade. Following four years of attempts to overcome the State's delays, Hillis managed to get his case to trial, where he proved that he was terminated for refusal to hand out the grade. The Attorney General then, on appeal, submitted an original brief claiming that the grading incident was a proper, constitutional, and actual motivation for his dismissal. (Appeal was being used as a method of alternative pleading!) Justice Clark, in spite of this history of the case, saw fit to give the Attorney General still one more bite at the apple: the supplemental brief meant Hillis had to overcome again the contention that First Amendment activities were not the real reason for his termination.

Counsel for Hillis duly objected to the panel's invitation of unassigned error and its attempt to educate the Attorney General in a more welcome theory of the case. The Attorney General, meanwhile, submitted the supplementary brief on evidentiary sufficiency and added into it, uninvited, a still further new point of error: that the District Court had misunderstood *Mt. Healthy*. The new point of error was pressed with the request that, in applying *Mt. Healthy*, the panel "stand in the shoes of" the SFA administration. The panel did not find this invitation improper. Instead, the panel adopted all of the more contentious passages in the Attorney General's brief as its findings of fact, and used as a "whole record" for review *selected* transcript pages attached to the Attorney General's supplemental brief. The panel concluded substantial evidence lay against, not for Hillis. This was a capricious departure from basic fairness, from due process, and from the rule of *Western Cottonoil Co. v. Haynes*, 218 F.2d 158, 161 (5th Cir. 1954), that "the force and effect of the testimony *considered as a whole*" must be reviewed (emphasis added). *Accord, U.S. v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948) (review of entire evidence must leave court with definite and firm conviction mistake has been committed).

The appellate panel's bias against the pariah Hillis also appeared in a readiness to misconstrue facts in the record. So that it could conclude Hillis was not protesting the grade change before he was terminated, the panel wrongly assigned the date of February 4 to the January 28 meeting Hillis and the AAUP representative had with Delaney. Hillis had protested the grading *incident* as early as December; he discovered and protested the grade's *alteration* at the January 28 meeting; he protested the alteration to

the AAUP in a January 29 letter to the AAUP; and on February 4 he was protesting the grade change to Dean Turner, a few hours before Turner and Delaney co-authored his non-renewal letter.

The panel also fancifully recast SFA grading policy. There was no university publication of any sort enabling Delaney's "advance placement" practices, and no less an authority than the university President, Dr. Steen, testified there was no such policy. *See* Appendix B at pages B3 - B5. The Fifth Court overcame this difficulty by first insisting, "Our resolution of this case does not hinge . . . on whether an advance placement policy existed at SFA." Slip Op. 14105. But within two paragraphs the panel stated Hillis' refusal to award the grade was "plain insubordination" to "SFA policy." *Id.*

The appellate panel also concluded Hillis' First Amendment rights were not violated, since the AAUP "concurred in the finding" by the SFA Fine Arts Council that there had been no violation of academic freedom. Slip. Op. at 14109. It is well known in academic circles that the AAUP neither has nor seeks powers of adjudication or administrative review. The AAUP made no findings in Hillis' case, and the local chapter merely forwarded to national headquarters a report on the SFA administrative proceedings. This action had no probative significance whatsoever, and certainly not the adverse significance ascribed by the panel.

Another factual misinterpretation by the panel concerned Hillis' allegedly "abrasive" encounter with a Mrs. "Diane" Ford, whom the panel identified as a "library staff person." The thrust of the panel's identification was that it was "rudeness" on Hillis' part to expect she would

know about art. Professor Dionne Ford actually was an Art department faculty member presented by SFA as an expert witness—a circumstance not disclosed by the Attorney General's selected transcript, but duly indicated in the full record. The appellate panel, swelled with a sense of its own superior accuracy, should have been more hesitant by ordinary caution, as much as by law, to refashion the trial court's findings.

The appellate panel, finally, made a free search into the cold, partial transcript furnished by the Attorney General for "corroboration" of Delaney's discredited testimony. This free search was erroneous and unjust. To rehabilitate Delaney's disbelieved story that he had decided to fire Hillis in December before the grading incident ever occurred, the panel seized upon "corroborative" testimony from Dean Turner, who collaborated in the firing decision and said it was made in December. Turner had added, however, *in response to a question from the court*, that the "grading incident" was a "substantial factor" in the decision. His answer could only have meant, to the attentive trial judge who then *repeated the question* in the formula, "Is that a fair summing up?", that Delaney had misled the court as to the date, and that Turner was not corroborating Delaney but serving to impeach him: the firing decision *followed* the grading incident. The panel, however, styled this an "obvious oversight of important corroborating testimony." Slip Op. at 14107.

II. The Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

The appellate panel's reassessment of what constituted evidence, for purposes of a *Mt. Healthy* determination

of whether Hillis was fired for protected conduct, ended on the conclusion that "Hillis' only credible first amendment claims related to his criticism of Delaney which the record shows played no part in SFA's decision to terminate him. He failed to establish any censorship of the content or method of his teaching." Slip Op. at 14109. The District Court, in contrast, had found protected Hillis' refusal to award the unearned grade, his teaching methods in Art 550G, his appearances with AAUP representation before his administrative superiors, and his protests over the grading incident and over his retaliatory removal from 550G. The clear weight of authority favors the District Court's wider ambit for protected activity.

A non-tenured teacher cannot be fired for exercising constitutional rights. *Perry v. Sinderman,* 408 U.S. 593, 597-98 (1972). One such right is academic freedom, implied by the First and reserved by the Ninth Amendment. See *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967). The constitutional freedoms of teachers deserve especial vigilance, for teachers "cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." *Wiemann v. Updegraaf,* 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring). Academic freedom clearly comprehends both the content and the method of teaching. *Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *Keyishian,* 385 U.S. at 603; *Regents of the University of California v. Bakke,* 438 U.S. 265, 311-14 (1978). The right of academic freedom may be claimed by a university confronted with governmental or off-campus sources of repression. *Sweezy,* 354 U.S. at 263. When administrative forces within a university act to

restrain an individual teacher's right to determine content or method, however, the right is clearly the teacher's. *Keyishian,* 385 U.S. at 603.

Protections of teaching method against administrative curbs have been extended in case law to situations which, compared to Hillis' predicament, border on the bizarre, startling, and trivial. *See Mailloux v. Kiley,* 448 F.2d 1242 (1st Cir. 1971) (teacher wrote four-letter word on blackboard to demonstrate concept of taboo); *Webb v. Lake Mills Community School District,* 344 F. Supp. 791 (D. Iowa 1972) (teacher had students use tea to simulate whiskey in school play). Surely, given such precedents, there is constitutional room to protect the very activity of teaching itself. That is the issue presented in this case. Hillis, in refusing to award an unearned grade to Kelly Perkins, was insisting on content and method. The grade directive was an unlawful mandate not to teach, instruct, supervise, or evaluate the student Kelly Perkins. An analogy to prior restraint is not misplaced. *See Near v. Minnesota,* 283 U.S. 697 (1931). The directive's suppressiveness was thorough: not merely *some* content or method was squelched; *all* content and method were prevented. Hillis' right to communicate, set in motion by the course assignment, was cut off by an administrative directive unauthorized by any valid regulation of the university or law of the State of Texas.

It is true that academic freedom does not extend to illegal activities carried out under a false banner of First Amendment protection. Such actions clearly would de-

serve the Fifth Circuit's label, "plain insubordination," as cases in which teachers have disobeyed lawful, published rules have borne out. *See, e.g., Ahern v. Board of Education,* 456 F.2d 399 (8th Cir. 1972); *Graves v. Walton,* 410 F.2d 1153 (5th Cir. 1969); *Palmer v. Board of Education,* 603 F.2d 1271 (7th Cir. 1979). Hillis' case is different. Illegality would have lain on the side of *following* Delaney's corrupt order. Illegality would also have lain in silence, once Hillis discovered the grade's alteration.

Hillis' only remedies are constitutional. He did not have the benefit of a campus prosecutor to whom he could report violations of campus rules. He did not even learn Delaney had broken faith with him, and changed the "WH" to a "B," until late January. Hillis exhausted every administrative remedy available from that point on—understandably with a view to his own reinstatement, rather than to prosecution of Delaney. Complicity in Delaney's fraudulent practices tainted those administrators who heard and rejected Hillis' appeals. Nor was there recourse to any official misconduct statute, either as a punitive measure against Delaney or as a remedial help to Hillis.

Hillis' proper reliance was upon the constitution. His right to determine a grade was cognizable under the First Amendment, as well as under the general law of administrative due process and the American academic tradition, reflected in ordinary faculty handbooks such as the then-current *Faculty Handbook* for SFA (No. 7, 1973). *See* Appendix B at pages B3 - B5, the entries on "Grade Distribution," "Absences from Classes by Students," "Class Record Book," and "Cheating," the last condemn-

ing "dishonesty of any kind" involving examinations and tampering with grade records, and placing preventive responsibility on the individual instructor. A university catalog, by law, fixes the manner in which a faculty grades and promotes its students. *Slaughter v. Brigham Young University,* 514 F.2d 626 (10th Cir. 1975); *Anderson v. Laird,* 466 F.2d 283 (D.C. Cir. 1972), *cert. denied,* 409 U.S. 276 (1972); *University of Miami v. Militana,* 184 So.2d 701 (Fla. App. 1966). The unpublished policies of advance placement privately carried on by Delaney at SFA were unavailable, by law, as a grounds for Hillis' discharge. In *Williams v. Board of Regents of the University System of Georgia,* 629 F.2d 993, 1000 (5th Cir. 1980), it was held that discharge cannot flow from violation of a policy unless the policy (1) factually existed, (2) was consistent with statutes and regulations, (3) was not vague, (4) infringed no First Amendment rights, (5) was communicated to the complainant, and (6) was not contrary to public policy. Delaney's placements failed all six requirements.

Public policy condemns grade awarding by anyone not the judge of student performance. Anything less is grade-tampering, about which the national press has recently been severely admonitory. *See* J. Underwood, "Student Athletes: The Shame, the Sham," *Sports Illustrated,* May 19, 1980, at 36 (Appendix B, pages B10 - B13). The university teacher holds a public trust as certifier of competence in the professions, a trust betrayed by credit given for work not done. A "free" grade is a fraud upon other students, other faculty who perform conscientiously, and the taxpayer; the unearned grade is also a telling lesson in sordid professionalism for the "favored" student.

The individual teacher's right to evaluate is recognized by the doctrine of judicial abstention. No court presumes itself as expert, in academic judgments of ability and performance, as the faculties of the universities. *See Dehaan v. Brandeis University,* 150 F. Supp. 626, 627 (S.D. Mass. 1957); *Lai v. Board of Trustees of East Carolina University,* 330 F. Supp. 904, 906 (D.C. N.C. 1971); *Edde v. Columbia University,* 168 N.Y.S.2d 643 (Sup. Ct. 1957); *Connelly v. University of Vermont,* 244 F. Supp. 156, 160 (D. Vt. 1965). Analyzed most incisively, the absention doctrine strengthens in direct proportion to the grader's familiarity with his student and subject. See *Keyes v. Sawyer,* 353 F. Supp. 936, 939-40 (S.D. Tex. 1973), *aff'd,* 496 F.2d 876 (5th Cir. 1974):

> The assignment of grades to a particular examination must be left to the discretion of the instructor. He should be given the unfettered opportunity to assess a student's performance and determine if it attains a standard of scholarship required by that professor for a satisfactory grade.

This Court, through Mr. Justice Rehnquist, has made the same point, excluding administrators as well as courts from gainsaying a teacher's grading standards:

> Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making.

Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1979). Strong precedents, then, join

strong policy in supporting the right to grade as an important component of academic freedom.

Hillis also had a right, under the First Amendment, to protest the grading incident and the graduate course removal as infringements of his academic freedom. He had a right to appeal to the AAUP for representation when he went before his chairman and SFA administrators. *Kaprelian v. Texas Woman's University,* 509 F.2d 133 (5th Cir. 1975); *Grimm v. Cates,* 532 F.2d 1034 (5th Cir. 1976). Hillis' criticism of Delaney did not lose protection simply because it was directed at or to his nominal superior. *Givhan v. Western Line Consolidated Independent School District,* 439 U.S. 410 (1979). Hillis' allegedly "abrasive" and "uncooperative" behavior was also, as the trial court found, within the ambit of constitutional protection afforded by *Pickering v. Board of Education, supra.*

As for Hillis' teaching methods, which Delaney twice nipped in the bud by subterfuge (changing the Perkins grade, taking over Art 550G), these were responsible methods, well within curriculum course descriptions and profession-wide standards. An uncontroverted deposition from a qualified expert witness was read into evidence to this effect at trial. Hillis' methods deserved First Amendment protection. *Cf. Ahern,* 456 F.2d at 404 (teacher properly dismissed who taught politics in economics class); *Clark v. Holmes,* 474 F.2d 928 (7th Cir. 1972) (substitute teacher justly terminated for defying superiors as to syllabus for state-required health course). Hillis took no such liberties with the curriculum. He sought to teach in the manner he believed most effective.

III. The Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court.

The parameters of academic freedom—respecting not only grading but teaching methods and protest of unlawful orders—are left very blurred by the Fifth Circuit's disposition of this case. Though acknowledging that academic freedom exists and has constitutional protection, the appellate panel found none of Hillis' activities worth safeguarding. This result might be acceptable if Hillis were a charlatan, an inciter of campus disturbances, or neglecter of his duties. But he is none of those. His actions were taken up in resolute insistence upon academic integrity.

Hillis' situation is important and symptomatic. The SFA Art department was, in microcosm, typical of many modern academic departments. Our public universities, which grew sharply in number and budgetary size during the 1960's, have faced dwindling enrollment, yet too often have elected to stave off the demographic reckoning by lowering standards. Competition for enrollment—to which state appropriations and faculty positions, salaries, and promotions are linked—has reached inutile proportions when colleges must recruit students and induce them to enroll with promises of free grades and unearned hours. At SFA's art department, these conditions were in full blossom. Chairman Delaney's proudest achievement was that he had "built up" the number of Art majors—in Nacogdoches, Texas—from 98 to over 400. The same administrators at SFA who instituted such standards also had power to stigmatize a critic—Hillis, who would not "go along with the system"—by terminating him, and

power to perfect the fraud by controlling administrative review and finding all was proper.

The institution of tenure—supposed mainstay of academic freedom—did not produce at SFA any objectors to this lowering of standards to increase enrollment. Hillis, having no tenure, was a lone voice soon thrown against all the procedural and evidentiary burdens accompanying non-renewal. This Court is amply familiar, from *Board of Regents v. Roth,* 408 U.S. 564 (1972) and its numerous progeny, with what those burdens are. The proper legal solution for Hillis' case is not a revision of those points of due process, but a clarifying of First Amendment freedoms for one who, like the boy in the fable, dares to jeopardize his job-worthiness by declaring the emperor is naked.

Judicial recognition that it is the First Amendment, and not tenure, which protects academic candor, will lay a socially useful predicate for universities which are currently re-evaluating the need for tenure. That tenure can protect interests which society does not value is well known. We do not cherish the transition to non-productivity, nor the loss of interest in research and new knowledge, which too often attend the virtual assurance of lifelong employment. Neither do we value tenure when it produces indifference to students, deafness to evaluation, and genius which allows itself to decline to ineptitude. Mobility for our best educators, meanwhile, has all but disappeared, as universities across the nation have granted tenure to all the professors they can accept. *See* D. Robertson, "The Overprotected Professors," *Newsweek,* February 15, 1982, at 17; Appendix B at pages B6 - B9. Young Ph.D.'s now wait for older ones to die and sur-

render place; the inflow of new ideas is reduced to a trickle, or worse, conspired against when it threatens those no longer of vigorous mental habit. Weighing still more heavily against the tenure system is its yield-cost ratio, which begins plummeting as soon as those who gain tenure and have a penchant for campus politics turn their talents in that direction and become assimilated into cliques and power structures who have charge of awarding (generally to their own kind) desirable teaching assignments, raises, promotions, honors, and other benefits. It should surprise no one that campus incomes are inversely proportional to hours taught and articles published, nor that the facile and insincere cry for academic freedom goes up when an allegedly anti-intellectual public demands an accounting.

Whether universities choose to modify or abolish tenure, as a matter of contract law, is not this Court's concern. Whether universities suffer a culturally and economically costly tenure system to be perpetuated, out of a belief that the constitution does not adequately protect academic freedom, is a different matter. Academic freedom needs no more than constitutional protection. The tenure system, as Hillis' fate proves, does not protect the vocal untenured from retaliation and ostracism, regardless of merit, at the hands of the tenured. The constitution, in contrast, does not allocate the right to speak; it is the constitution which should protect those who have the courage, in these times, to insist upon academic excellence.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-1570

RICHARD K. HILLIS,
Plaintiff-Appellee-Cross Appellant,

v.

STEPHEN F. AUSTIN STATE
UNIVERSITY, ET AL,
Defendants-Appellants-Cross Appellees.

Appeals from the United States District Court for the
Eastern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 1/11/82, 5 Cir., 198__, ____F.2d____).

(February 4, 1982)

ORDER:

(√) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
Chief Judge

A2

Richard K. HILLIS,
Plaintiff-Appellee Cross-Appellant,

v.

STEPHEN F. AUSTIN STATE UNIVERSITY, ET AL,
Defendants-Appellants Cross-Appellees.

NO. 80-1570.

United States Court of Appeals,
Fifth Circuit,*
Unit A

Jan. 11, 1982

Appeals from the United States District Court for the Eastern District of Texas.

Before CHARLES CLARK, SAM D. JOHNSON and TATE, Circuit Judges.

CHARLES CLARK, Circuit Judge:

The defendants in this section 1983 action, Stephen F. Austin University (SFA) and Dr. Creighton Delaney, appeal the district court's decision, 486 F.Supp. 663 (E.D. Tex. 1980), concerning the non-renewal of employment of Richard Hillis, a nontenured art professor. The district court found that Hillis' nonrenewal was constitutionally impermissible and ordered reinstatement with backpay against SFA and Delaney jointly and severally. Because the court was clearly erroneous in its factual first amendment findings under *Mt. Healthy City School District v.*

Doyle, 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977) we reverse.[1]

Dr. Hillis began teaching at SFA in the fall of 1974. Shortly after the term began he received a note from the head of the Art Department, Dr. Creighton Delaney, instructing him to carry a student, Kelly Perkins, for advanced placement on his class roll in Art 300, and to give her a "B" for the course. Despite Hillis' reservations concerning this matter there was no discussion of it between him and Delaney until some time in December.

SFA had no specific written policy which authorized Delaney to give an advance placement grade for Art 300. Delaney insists he was acting pursuant to established SFA policy in acting as he did. Hillis states he knew of no such [14105] policy and thought it a violation of his academic freedom for Delaney to insist he give a grade to a student whose work he had not reviewed. Our resolution of this case does not hinge on resolving the parties' dispute over whether an advanced placement policy existed at SFA, because the record demonstrates Hillis' claim of academic freedom based on the grading incident lacks merit. The district court found that the December discussion became a heated debate, which solidified a rift between the two educators. Whatever might have been the true substance of this meeting, in its aftermath Hillis gave Ms. Perkins a "grade withheld," and not a "B". Several weeks later, Hillis returned from a conference in Washington to find that Delaney had reassigned him for

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1. Our determination that the district court erred in its findings of fact makes unnecessary any analysis of the eleventh amendment contention raised by plaintiff. The district court's eleventh amendment analysis is discussed however, in *United Carolina Bank v. Board of Regents, Stephen F. Austin State University*, __F.2d__, No. 80-1625, Slip op. at _____ (5th Cir. 1981).

the spring semester from a graduate research course to a freshman design course. Hillis protested the reassignment in a February 4, 1975 meeting with Delaney at which Dr. Rodewald, an American Association of University Professors (AAUP) member was present. At this meeting, Delaney cited the earlier grading incident as an example of Hillis' lack of cooperation. The mention of the grade incident prompted Hillis to discover at the registrar's office that Delaney had changed the "grade withheld" to a "B". The next day, Hillis received a letter informing him his contract would not be renewed. Various forms of further protests by Hillis ensued, but are irrelevant in the sense that they could not have formed the basis for Hillis' non-renewal.

The district court found that Hillis engaged in a number of protected activities, first and foremost being his meeting with Delaney concerning the Perkins grade, and his criticism of the directive. Also found to be among his protected activities was an appeal to the AAUP for representation and relief in the matter of the reassignment, the grading incident, and his protests about these matters. The district court correctly stated the pertinent law: a teacher does not surrender constitutionally protected rights of freedom of expression as a condition of public employment, *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). It is also correct that Hillis' alleged criticism of Delaney did not *per se* lose its protection merely because it was private expression directed at his superior. *Givhan v. Western Line Consolidated Independent School District,* 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97, 58 L.Ed.2d 619 (1979). However, the record does not support the court's findings of fact under *Mt. Healthy,* 429 U.S. at

285-87, 97 S.Ct. at 575-76, concerning whether, when, and how Hillis engaged in these "protected activities," whether this motivated his nonrenewal, and whether he would not have been renewed regardless of them.

The district court found that Hillis' nonrenewal was substantially motivated by his exercise of first amendment rights. According to the court, this finding was based largely on "Delaney's testimony" that the "Perkins incident was not 'insubstantial' in his decision to recommend nonrenewal." In fact, Delaney did not testify to that effect, rather, the statement was attributed to him by Dean Turner. More significantly, testimony that the *"incident"* was a factor was translated by the court into a finding that Hillis' *criticism* of Delaney's action and SFA policy was a substantial factor in his nonrenewal. This mistake in assessing the proof led to reversible error.

The Perkins incident unquestionably involved plain insubordination as one component, and arguably included Hillis' [14106] first amendment-protected criticism as another. However, the plaintiff's own testimony undercuts the court's finding that the Perkins incident involved the type of criticism which could have been a substantial factor in his nonrenewal. Neither Hillis nor Delaney testified that the December discussion of the grading matter became a heated debate. Rather, Hillis testified that the discussion culminated in an agreement on how to resolve the situation.[2]

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2. Hillis testified that Delaney agreed to have Ms. Perkins submit her portfolio to Hillis for review, prior to entry by Hillis of the "B" grade. If this was Hillis' understanding of their discussion, it is logical that he made no protest over Delaney's actions until February when he discovered that Delaney breached this "agreement." Whether Hillis' recollection of the December conversation is accurate is unimportant. At the least, in his own mind there was an agreement with Delaney, and therefore no protest was made until weeks later.

Hillis testified that he did not protest the grading incident until after the February 4th meeting concerning his reassignment,[3] and therefore the only fair reading of his testimony is that he did not engage in substantial first amendment activity until the February protests. Thus, the testimony by Delaney and Turner that the Perkins "incident" played a substantial part in Hillis' nonrenewal discussion could refer only to the lack of cooperation displayed by Hillis with regard to Delaney's instructions and what Delaney thought was a violation of SFA policy. The timing of relevant events as well as their content demonstrate the testimony could not have referred to Hillis' exercise of any constitutionally protected right to protest or criticize. This did not occur until later.

The district court rejected Delaney's testimony that the decision to not renew Hillis had been made in December, and had been based only on Hillis' lack of cooperation and abrasiveness. The court rejected the testimony as uncorroborated, and possibly fabricated. However, Delaney's testimony about the timing of the decision to not renew Hillis and the reasons therefor, was corrobrated in full by the Dean of the Fine Arts School, Dr. Turner.[4] A

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3. His testimony was: "When I went to talk to Dr. Delaney [in February 1975] about being removed from this class . . . I don't think I was protesting the grade business to him at that time, because I don't think I knew that he had changed the grade yet. When he cited the grade as an example of my lack of cooperation . .. that's when I went to the Registrar's Office and checked on the grade and found out it had been changed to a B. *So, initially, I only protested the removal from the class to Dr. Delaney,* but I protested the removal from the class and the grade change to Dr. Turner, Dr. Lewis and Dr. Steen."

4. Indeed, Dr. Turner responding to a question by the court affirmed that the primary reason Delaney gave in recommending Hillis' nonrenewal was general lack of cooperation based on several listed specific instances of conduct in addition to the advanced place-

review of the record leaves us with the definite and firm conviction that the district court made a mistake in finding that an exercise of Hillis' first amendment rights was a substantial motivating factor in the nonrenewal decision. *In re Multiponics, Inc.*, 622 F.2d [14107] 709, 723 (5th Cir. 1980). The trial court's findings, based on statements attributed to the wrong persons and on obvious oversights of important corroborating testimony, are not supported by the record. This is not a case where the reviewing court would have found otherwise. Rather, it is a case where the trial court could not permissibly have found as it did *Movible Offshore, Inc. v. The M/V Wilken A. Falgout*, 471 F.2d 268, 271 (5th Cir. 1973).

Even if we were to assume that Hillis did exercise his first amendment rights and that his nonrenewal was predicated on that activity, the district court was clearly erroneous in its factual findings under the second prong of *Mt. Healthy*. The defendants did show by a clear preponderance of the evidence that Hillis would not have been renewed in any event.

The district court stated that other than the grading incident the only evidence with respect to Dr. Hillis' conduct concerned his acquisition of a projector light bulb in a manner contrary to university procedures. The court found that nonrenewal would not have occurred as a

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ment incident. Yet, the trial judge apparently discredited most, if not all of Delaney's testimony. The court found it "ironic" that Delaney, who offered so much testimony about Hillis' misconduct was the person who recommended his nonrenewal. It is not ironic that Delaney recommended nonrenewal—it is logical. Delaney was Hillis' immediate superior, the man required to be aware of Hillis' performance, and the man responsible for evaluating it. This is the case in most if not all institutional organizations. Moreover, the record contains much probative testimony by witnesses other than Delaney which the trial court for all practical purposes ignored.

result of this one incident. Hillis bought a projector bulb from a local store for use in his own projector, and presented the bill to the secretary of the art department. Delaney testified that Hillis had been instructed to follow normal university requisition procedures, and that this method was not in accord with those procedures. Assuming this to be so, Hillis' actions in flaunting proper procedures furnished another example of his lack of cooperation. More important, however, is the related testimony of Ann Turner, art department secretary, that Hillis flew into a rage as she attempted to explain proper acquisition procedures to him. Ms. Turner testified that Hillis' manner was abusive and that he used filthy language in her presence. Moreover, Ms. Turner stated that Hillis behaved toward her in this manner not just during the "light bulb" incident, but several other times as well. Hillis' abusive, ill-mannered behavior towards a staff member was made known to Dr. Delaney and Dean Turner. This record simply will not permit a facile conclusion that the "light bulb" incident with its explanatory testimony could not establish that Hillis' employment would not have been renewed regardless of his alleged first amendment activities.

The district court was also clearly erroneous in finding this to be the only other proof of Hillis' unsatisfactory conduct. Delaney testified that on one occasion, Hillis' refused to fill out Government W-2 forms saying it was "nonesense" to have to do so. On another occasion Hillis complained about not being able to locate blueprint paper in Nacogdoches. Delaney found a source for the paper in Lufkin, and Hillis agreed to pick it up during a trip there. Hillis neglected, however, to pick it up, and thereafter

persisted in complaining to Delaney's secretary about not having it. Finally Delaney himself drove to Lufkin and picked up the paper. He then noticed that Hillis did not use it for several weeks thereafter. Another example of uncooperative, abusive conduct by Hillis was given by Diane Ford, a library staff person, who testifed that Hillis shouted criticism of the graduate program and its students at her in the presence of several students. In Hillis' supplemental reply brief he seeks to belittle Ms. Ford's testimony because of her lack of knowledge in art. But, it was completely permissible for the officials at SFA to conclude that the state of Ms. Ford's erudition should not insulate Hillis [14108] from the consequences of his rudeness to her. Denaney also testified that even after being notified of his reassignment Hillis persisted in attending the class from which he had been transferred. Delaney, who had himself taken over the class, was thus put in the awkward position of having to ask Hillis to leave in the presence of the students assembled. A January 20 memorandum from Delaney to Dean Turner describing Hillis' lack of cooperation, abrasiveness and abusiveness offers further corroboration. It shows that in the context of what was known to Delaney and Dean Turner when the decision was made not to renew Hillis' employment, the Perkins grading incident was just one other example of unsatisfactory demeanor and attitude on the part of a probationary employee. The preponderance of the evidence showed clearly that Hillis would not have been renewed regardless of his later first amendment activity.

In sum, the facts of this case and their misapplication by the district court, reflect the concerns voiced by Justice Rehnquist in *Mt. Healthy*:

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. at 286, 97 S.Ct. at 575. Hillis' nonrenewal was clearly based on his continual lack of cooperation and unacceptable conduct, of which the grading incident was just one example. Hillis' subsequent protests did not prevent his employer from implementing the decision not to renew his employment contract.

The district court's decision was grounded solely on the *Mt. Healthy* first amendment analysis. Little mention was made of Hillis' fourteenth amendment due process claims or his asserted rights of academic freedom based in part on the first and ninth amendments. Although Hillis did not specifically assign these omissions by the district court as error, he urges this court to consider them on appeal. We do and find both lacking in merit.

As a nontenured teacher Hillis' continued employment was expressly contingent on satisfactory professional performance. He had no legitimate claim of entitlement to or property right in continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). His unsatisfactory professional performance and abrasive personality vitiate any possible contractual claim which would form the basis for a claimed deprivation of a fourteenth amendment property right.

Hillis' procedural due process theory is similarly untenable. A nontenured professor has no constitutional right to a hearing absent a protected property interest or liberty interest. *Board of Regents v. Roth*, 408 U.S. at 576-77, 92 S.Ct. at 2708-09, and Hillis has proven neither. Moreover, under SFA procedures set out in Faculty Handbook No. 7, which governed Hillis' term at SFA, a hearing before the Faculty Senate for nontenured professors is left to the discretion of a faculty committee. This procedure was followed in Hillis' case. Hillis' claims of academic freedom violations received a [14109] preliminary review by a faculty committee, the Fine Arts Council. The Council found no violation and therefore a full hearing before the Faculty Senate was not held. Subsequently, the AAUP concurred in the finding that Hillis' academic freedom had not been violated. The procedural rights Hillis received were constitutionally sufficient.

Finally, Hillis alleges that his refusal to assign the grade of "B" to Ms. Perkins was protected by the "full panoply of constitutional and judicial recognition of the broad principle of academic freedom." More specifically, he claims academic freedom to be an intellectual right implied by the first and reserved by the ninth amendments. *See Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967). Hillis' attorneys, in support of their claim for additional attorney's fees, claim: "Academic freedom is an amorphous field about which a great deal has been said in esoteric law journal articles and academic publications, but little determined in explicit, concrete judicial opinions." This is nearer the mark. While academic freedom is well recognized, *e.g. Healy v. James*, 408 U.S. 169, 180-81, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972), *Keyishian v. Board of*

Regents, 385 U.S. at 603, 87 S.Ct. at 683 (1967), its perimeters are ill-defined and the case law defining it is inconsistent. Its roots have been found in the first amendment insofar as it protects against infringements on a teacher's freedom concerning classroom content and method. *E.g. Regents of University of California v. Bakke,* 438 U.S. 265, 311-314, 98 S.Ct. 2733, 2759-60, 57 L.Ed.2d 750 (1978); *Keyishian v. Board of Regents,* 385 U.S. at 603, 87 S.Ct. at 683; *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). *See also Board of Regents v. Roth,* 408 U.S. at 580-82, 92 S.Ct. at 2710-11 (Douglas, J. dissenting); *In re Dinnam,* 661 F.2d 426 (5th Cir. 1981); *Sterzing v. Fort Bend Independent School District,* 496 F.2d 92, 93 (5th Cir. 1974). However, the record here fails to establish that the defendants sought to "cast a pall of orthodoxy," over Hillis' classes. *Keyishian v. Board of Regents,* 385 U.S. at 603, 87 S.Ct. at 683. Hillis' claim that the refusal to assign a grade to Kelly Perkins constituted a "teaching method" is unfounded.

A nontenured teacher may be fired for any reason or for no reason at all but not for the exercise of constitutionally protected rights. *Perry v. Sinderman,* 408 U.S. 593, 597-98, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972). Hillis' only credible first amendment claims related to his criticism of Delaney which the record shows played no part in SFA's decision to terminate him. He failed to establish any censorship of the content or method of his teaching.

The judgment appealed from is REVERSED.

A13

Richard K. HILLIS, Plaintiff,

v.

STEPHEN F. AUSTIN STATE UNIVERSITY et al.,
Defendants.

Civ. A. No. TU-75-360-CA.

United States District Court,
E. D. Texas,
Tyler Division.

March 13, 1980.

ROBERT M. PARKER, District Judge.

This cause was tried to the Court, sitting at Tyler, Texas, with trial commencing on August 28, 1979. After two days of evidence and argument by counsel for the respective parties, the Court announced its decision to take the matter under advisement. In connection therewith, the Court requested briefs of counsel on the Eleventh Amendment immunity issue. Said briefs were duly submitted and reviewed by the Court in reaching its decision. After a review of the testimony and the relevant authorities, the Court finds for the Plaintiff in [665] connection with his claims under the First and Fourteenth Amendments to the United States Constitution and orders monetary and injunctive relief.

I.

The Facts

Richard K. Hillis accepted a teaching position at Stephen F. Austin State University, Nacogdoches, Texas,

for a nine month period which began August 23, 1974. Dr. Hillis possessed a strong academic background for the regional university, having received his Doctor of Arts from the Carnegie Mellon University in 1973.[1] A review of his vitae, admitted as Plaintiff's Exhibit #3, reveals impressive achievements as a practicing studio artist and as a critical writer in the field of art. The conclusion that he possessed a high degree of professionalism is supported by a review of the recommendation letters which are appended to his vitae. Dr. Hillis was an asset to Stephen F. Austin University.

The Art Department at Stephen F. Austin University had been conceived primarily as a training ground for art teachers in the primary and secondary schools. As the university grew, the direction of the Art Department expanded in scope. While a majority of art majors continue to concentrate in Art Education, Stephen F. Austin has matriculated a significant number of art majors with other career goals.

Dr. Hillis was part of the new wave in the Art Department. As a result of Dr. Hillis' integrity, high professional standards, and introduction of new teaching methods, a series of confrontations with Dr. Creighton Delaney, Chairman of the Art Department, ensued. It does not escape the Court's sense of irony that Creighton Delaney was the man chiefly responsible for Dr. Hillis' hiring.

On September 4, 1974, only six days after Dr. Hillis began teaching at Stephen F. Austin, he received a memorandum from Dr. Delaney. (Plaintiff's Exhibit 69) Dr.

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1. Dr. Hillis received a Bachelor's of Fine Arts from Ohio University in 1960 and a Master's of Fine Arts from the University of Arizona in 1967.

Hillis was teaching Art 300[2] in the Fall term of 1974. Art 300 was a design course for which studio hours were required. Dr. Delaney, in the September 4th memorandum, instructed Dr. Hillis to carry Kelly Perkins on his class roll for Art 300 and to give her a "B" for the course.[3] In accordance with Dr. Delany's instructions, but still uncertain about them, Dr. Hillis listed Ms. Perkins on his twelfth day class roll.

The semester passed, and Dr. Hillis never saw Ms. Perkins in his class nor did he review her portfolio. The plaintiff made several attempts to speak to Dr. Delaney about Ms. Perkins. Dr. Delaney testified that he made the same attempt to speak to Dr. Hillis. In any case, the subject of Kelly Perkins and the September 4, 1974, memorandum was not discussed between Dr. Delaney and Dr. Hillis until sometime in early December, before the end of the Fall term and the final examination period.

The December meeting between Dr. Hillis and Dr. Delaney evidently turned into a heated debate. It was Dr. Hillis' position that he could not award a grade for a studio course to a student whose work he had never seen. Dr. Delaney's position was that as head of the Department his assessment of Ms. Perkins' work should be a sufficient guarantee of its quality to warrant the award of a "B". The disagreement over Ms. Perkins seemed to solidify the rift between the two educators, the new wave refusing to compromise his integrity to give way to the old.

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2. The first digit of a course number indicates its level with digit number 1 indicating a freshman level course.

3. In fairness, the memo stated that Ms. Perkins had received credit from another institution. However, Ms. Perkins had not, and Dr. Delaney had been the person who awarded her advanced credit.

Believing that Dr. Delaney would allow him to review the student's work before assigning the grade, Dr. Hillis gave Ms. [666] Perkins a "WH", signifying that her grade was being withheld. Dr. Hillis did this even though he had given another student an "F" for excessive absences. Sometime after Dr. Hillis had turned in his grades, but before they were posted, Dr. Delaney changed the "WH" to a "B".

It was not until January 28, 1975, that Dr. Hillis learned of the grade change. By that time, Dr. Delaney had struck again. Dr. Hillis had been appointed to the graduate faculty on October 1, 1974. (Plaintiff's Exhibit 38) For the Spring Semester, Dr. Hillis had been assigned a graduate seminar course in research techniques in art, Art 550G. After a university approved trip to Washington, D.C., for an art conference, Dr. Hillis was reassigned to teach Art 100. Dr. Delaney took over the teaching responsibilities for Art 550G.

In response to his reassignment, Dr. Hillis initiated an airing of grievances through Dr. Fred Rodewald, a member of the American Association of University Professors, on January 28, 1975. It was through a conference between Rodewald, Delaney and Hillis that the grade change was revealed to the plaintiff. Plaintiff's Exhibit 8, a letter Dr. Hillis wrote to Dr. Bos, the President of AAUP at Stephen F. Austin, was dated January 28, 1975. This letter dealt exclusively with the reassignment. Plaintiff's Exhibit 9, another letter to Dr. Bos from Dr. Hillis, was written after the conference with Rodewald and Delaney. In Exhibit 9, Dr. Hillis protested the grade change as an infringement of his academic freedom.

A letter dated February 5, 1975, from Delaney informed Dr. Hillis that his teaching contract would not be

renewed. (Plaintiff's Exhibit 11) Notably absent from the letter are any reasons for the failure to renew his contract. However, it was Dr. Delaney's own testimony at trial that established that the Kelly Perkins matter was not "insignificant" in the nonrenewal decision. The Court agrees with Dr. Delaney's assessment but carries it a step further; Dr. Hillis' protected activities in respect to Kelly Perkins were a motivating factor in the failure to renew Dr. Hillis' teaching contract.

Before entering legal findings with respect to the nonrenewal, it is of some significance to note two other factual areas established at trial. Dr. Hillis made numerous attempts after February 5, 1975, to give the University an opportunity to resolve the matter itself. Among these were two separate requests for faculty senate hearings; both were denied. A Fine Arts Council Investigation Committee was empaneled to investigate the allegations of infringement of academic freedom, but the committee had no authority to deal with the question of non-renewal. Yet, the University felt sufficiently certain of its position to twice advise Dr. Hillis that he had exhausted his administrative remedies with respect to his non-renewal.

From the time of his non-renewal to the time evidence was heard in this case, Dr. Hillis made 286 applications to art-related employers. (Plaintiff's Exhibit 73) Dr. Hillis was rejected from consideration each time. At the trial of this case, Dr. Hillis had been employed by Texas Instruments in Lubbock, Texas, earning hourly pay. Before his employment with Texas Instruments, Dr. Hillis had worked as a manual laborer for the City of Lubbock. His total earnings from both employers over the four year period were $18,699.43. The parties stipulated that Dr.

Hillis' salary for four academic years at Stephen F. Austin State University would have totalled $87,545.00.

II.

The Merits

A teacher does not surrender constitutionally protected rights of freedom of expression and petition for redress of grievances as a condition of public employment. *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Epperson v. Arkansas,* 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). This fundamental precept of public employment, entrenched as it is in the case law, requires the Courts to guard against its infringe- [667] ment by the public employer. While public entities are free to make personnel decisions, their freedom of decision may not exceed their constitutional authority. When a public employer exceeds its constitutional license, the employee has but one recourse, the Courts. After a review of the evidence in the instant case, the Court may draw only one conclusion. Stephen F. Austin has exceeded its constitutional license; the University has made a personnel decision for a constitutionally impermissible reason.

Richard Hillis engaged in a number of protected activities. First, and probably most important in terms of the employment consequences, he met with Dr. Delaney to discuss the Kelly Perkins directive. His criticism of the directive and request to review Ms. Perkins' portfolio were protected by the First Amendment. *Givhan v. Western Line Consolidated Independent School District,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). Prior to being notified of his non-renewal, Dr. Hillis

appealed to the AAUP for relief from infringement of his academic freedom. This he clearly had a right to do. *Mailloux v. Kiley,* 448 F.2d 1242 (1st Cir. 1971); *Kaprelian v. Texas Women's University,* 509 F.2d 133 (5th Cir. 1975); *Grimm v. Cates,* 532 F.2d 1034 (5th Cir. 1976). Dr. Hillis' criticism of Dr. Delaney does not lose its protection simply because it was directed at or to his nominal superior. *Givhan, supra; Abeyta v. Town of Taos,* 499 F.2d 323 (10th Cir. 1974).

Having established that Dr. Hillis engaged in protected First Amendment activities, the Plaintiff was required to prove that the protected activities were a motivating or a substantial factor behind the non-renewal decision. *Mt. Healthy v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977). The evidence at trial established that one person, Dr. Creighton Delaney, had the authority to recommend non-renewal. Indeed, it was Dr. Delaney who exercised that power on February 5, 1975.[4] As previously noted, Dr. Delaney testified that the Perkins incident was not "insubstantial" in his decision to recommend non-renewal. The Court finds that the plaintiff successfully carried his *Mt. Healthy* burden.

At that point in the trial, the burden then shifted to the University to show that the same decision with respect

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4. Dr. Delaney testified that he had made the decision regarding non-renewal in December, 1974. This testimony is generally not worthy of belief insofar as it is uncorroborated and may be the product of fabrication. Dr. Delaney, if he had made the decision at that time, would likely have advised Dr. Hillis so that on his Washington, D. C. trip he could have entered the interview process for other employment. The art conference Dr. Hillis attended also functioned as a job market. In any case, relying solely upon Dr. Delaney's other testimony, the decision if it was made in December was predicated on the Perkins problem.

to Dr. Hillis' renewal would have been made had the Kelly Perkins controversy never occurred. As Justice Rehnquist described the employer's burden in *Mt. Healthy:*

> . . . the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.
>
> *Mt. Healthy, supra,* 287, 97 S.Ct. 576.

The University failed to meet its burden. The only evidence introduced with respect to Dr. Hillis' conduct other than incidents which followed the Perkins directive concerned Dr. Hillis' acquisition of a light bulb. Contrary to University regulations and procedures, Dr. Hillis had obtained a light bulb needed for classroom use in the business district rather than through the central store of the University. The incident and Dr. Delaney's description of it would not justify the conclusion that nonrenewal would have occurred as a result of this transgression.

The University's other position with respect to Dr. Hillis' non-renewal was that it was based on disruption of the academic community. Admitting pursuant to *Pickering, supra,* that its position was content related, the University argued that the [668] manner of Dr. Hillis' speech was so "abrasive and disruptive" that the University's interest in curtailing it by his non-renewal was justified. While the public interest and public forum aspects of *Pickering* seem to be in question after *Givhan,* the balancing test would seem to be available as an alternate

defense. The Fifth Circuit has considered possible disruptive effect of protected activity in the employment context.[5] In evaluating a disruptive effect defense, the Fifth Circuit has held:

> . . . In considering First Amendment rights the court is always required to look at the place, time, and circumstances involved in striking the necessary delicate balance between the interests of the government and the constitutional rights of the individual . . . We clearly recognized that in order to justify the slightest interference with First Amendment rights there must be a showing that the exercise of such rights 'materially and substantially' interfered with the duties required to be performed by an employee.
>
> *Abbott v. Thetford,* 534 F.2d 1101 (*en banc*), *reversing and adopting dissenting opinion,* quoted here 529 F.2d 695 at 706-707 (5th Cir. 1976).

There is no evidence that Dr. Hillis' speech with regard to the Kelly Perkins incident materially and substantially interfered with his teaching obligations. Likewise, his appeal to the AAUP regarding his reassignment and grade change were not *per se* disruptive of his teaching.

Dr. Hillis' protected activity could be construed as being disruptive only to Dr. Delaney. Were the Court dealing with a situation which required a close, personal

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5. Notably, *Smith v. United States,* 502 F.2d 512 (5th Cir. 1974) dealt with the disruptive effect of the practice of wearing a peace emblem by a staff psychologist at a V. A. Hospital whose patients were Viet Nam veterans at the height of the anti-war movement. *Abbott v. Thetford,* 534 F.2d 1101 (en banc), rev'g and adopting dissenting opinion 529 F.2d 695 (5th Cir. 1976); *Ayers v. Western Line Consolidated Independent School District,* 555 F.2d 1309 (5th Cir. 1977), *rev'd, Givhan, supra.*

and confidential relationship as the Fifth Circuit faced in *Abbott, supra,* the Court might reach a different result. Giving due regard to the time, place and manner of the protected activities, the fact that Dr. Hillis' conduct occurred in an academic environment has not escaped the Court's attention. This is not the sensitive situation presented by a Veteran's Hospital or a Judge's Chambers, nor are the working relationships analogous. *Smith,* note 5; *Abbott, supra.* There is no evidence to conclude, and common experience supports the converse, that a Department Chair and an Associate Professor must enjoy a close, personal or confidential relationship. In accordance with *Abbott,* the Court concludes that Dr. Hillis' protected activities did not materially or substantially interfere with his duties as a college professor.

Therefore, the Court concludes that the non-renewal of Plaintiff's contract was substantially motivated by the lawful exercise of protected First Amendment activitity. *Mt. Healthy, supra.* The University failed to show by a preponderance of the evidence that the non-renewal would have occurred absent the exercise of protected activity. *Mt. Healthy, supra.* Further, Dr. Hillis' exercise of protected activities did not materially or substantially impede his performance as a professor. *Abbott, supra.*

III.

The Remedy

Questions regarding remedial relief frequently turn on the appropriateness of a particular remedy for the harm suffered. Rather than focusing on a choice of remedies, the Court is put to the question of whether it possesses the power to grant full relief. Specifically, the Court is

called upon to decide whether monetary damages in the nature of a back pay award are recoverable against Stephen F. Austin State University in light of the Eleventh Amendment.

The language of the provision itself is the starting point for the Court's analysis of the remedy question:

> [669] The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State. U.S. Const. amend. XI.

Any consideration of an Eleventh Amendment immunity question would be incomplete without the historical footnote to *Chisholm v. Georgia,* 2 Dall. 419, 1 L.Ed. 440 (1793). *Chisholm* was a suit in assumpsit against the State of Georgia by two citizens of South Carolina. By ruling that the original jurisdiction of the Supreme Court extended to such a suit, public opinion with regard to sovereignty of the states was ignited. The Eleventh Amendment was ratified in response to the perceived invasion of the Supreme Court into the affairs of the coordinate sovereigns. As a result of the amendment, nuances of traditional sovereign immunity have gained constitutional protection. Not only is the Eleventh Amendment applicable to suits in the federal courts in which the State is named as a party, the Amendment has been extended to immunize arms or instrumentalities of a state. *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

Contemporary Eleventh Amendment jurisprudence was born with *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct.

1347, 39 L.Ed.2d 662 (1974). A class action in equity, the Plaintiffs sought relief from Illinois officials who administered a partially federal funded welfare program called the Aid to the Aged, Blind, and Disabled. The Illinois program qualifications were at variance with the federal guidelines. As a consequence of the variance, a class of persons who were qualified for benefits under the federal plan were excluded by the more stringent Illinois guidelines. Class relief ordered by the district court in *Edelman* was of two types: 1) declaratory relief that the class was entitled to prospective benefits, and 2) an equitable award of back benefits to each adversely affected class member. It was the retroactive award of back benefits which was reversed by a divided Supreme Court. In reaching the issue of whether retroactive benefits were barred as a form of relief by the Eleventh Amendment, the majority satisfied the initial inquiry that the suit was essentially one against the State of Illinois:

> These funds [retroactive benefits] will obviously not be paid out of the pocket of the petitioner Edelman . . . The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely [a] monetary award against the State itself . . .
>
> *Edelman, supra,* 664-665, 94 S.Ct. 1356-1357. (Citations Omitted)

Therefore, the question of damages immunity depends, at least in part, upon the source of revenue from which the award is to be paid.[6]

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6. The Court recognizes that *Edelman v. Jordan* has been supplemented by its sequel *Quern v. Jordan,* 440 U.S. 332, 99 S.Ct.

Three terms later an unanimous Supreme Court again had occasion to deal with a determination of whether a public institution and its officers were an arm of the State for Eleventh Amendment purposes. *Mt. Healthy v. Doyle, supra.* The lower court had ruled that the school district had waived its Eleventh Amendment immunity, but Justice Rehnquist, again writing for the [670] court on the immunity question, determined that the school district was the state for Eleventh Amendment purposes. To paraphrase Justice Rehnquist, it became a question of whether the district was "more like" the state or "more like" a political subdivision. *Mt. Healthy,* 429 U.S. 280, 97 S.Ct. 572. In answer to the question, the Court looked to Ohio state law in order to determine the nature of the entity. Factors looked to and relied upon in the determination may be listed as follows:

1. The extent of funding received from the state. The school district was found to have received "a significant amount." *Mt. Healthy,* 280, 97 S.Ct. 572.
2. The extent of state control exerted over the district. The district was found to have received "some guidance" from the Ohio State Board of Education. *Id.,* 280, 97 S.Ct. 572.

1139, 59 L.Ed.2d 1139 (1979). *Quern* dealt with the question of abrogation of Eleventh Amendment immunity through congressional enactment of 42 U.S.C. § 1983. Abrogation of immunity was found to be present in Title VII adoption in *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). The *Quern* decision failed to find that § 1983 abrogated Eleventh Amendment immunity. However, its holding is at least subject to question based upon the limited issue before the Court; i. e., the appropriateness of the injunctive decree. For the purposes of this case, *Quern* need not be contended with since it is chiefly a waiver/abrogation case. The fundamental question of the nature of the entity requires the Court's attention to determine if the University is the State for the purposes of the Eleventh Amendment. Since the question is resolved against immunity, waiver does not become an issue for the Court.

3. Power to generate own revenue. Ohio school districts were empowered to issue bonds and levy taxes. *Id.*, 280, 97 S.Ct. 572.

4. The applicable state definition of political subdivision. School districts were defined to be political subdivisions under Ohio law. *Id.*, 280, 97 S.Ct. 572.

Mt. Healthy and *Edelman* both noted that the nature of the inquiry and the factors considered would vary with the institution under consideration.

In answering the question of whether Stephen F. Austin may be shielded from damages by virtue of the Eleventh Amendment, the Court is unable to look to a precise holding of the Fifth Circuit on the issue. The Fifth Circuit has twice determined that junior colleges in the State of Texas may not cloak themselves with Eleventh Amendment immunity. *Goss v. San Jacinto Junior College,* 588 F.2d 96, *modified on other grounds,* 595 F.2d 1119 (5th Cir. 1979); *Hander v. San Jacinto Junior College,* 519 F.2d 273, *aff'd per curiam on rehearing,* 522 F.2d 204 (5th Cir. 1975). The Court also notes that a recent panel decision, *Gay Students Services v. Texas A & M University,* 612 F.2d 160 (5th Cir. 1980), may indicate the ultimate decision of the circuit with regard to state senior colleges. The decision implies approval of a finding that Texas Tech University was immune from a damage award. *Henry v. Texas Tech University,* 466 F.Supp. 141 (N.D. Tex. 1979). However, in the absence of a precise holding on the issue, the Court must follow the formula for evaluation of the question as set forth by the Fifth Circuit. *Gay Student Services* instructs the Court to look to the nature of the entity to first determine whether it is an arm of the state or an independent political sub-

division. If the University is an arm of the state, the Eleventh Amendment will bar a monetary award if such an award will be paid out of the state treasury. The evaluation of the institution based upon the nature of the entity may be referred to as a structural analysis.

In order to perform the prescribed structural analysis, the Court has looked to the statutory scheme and the relevant testimony adduced at trial.[7] In this regard, the Court has also looked with some emphasis to the Fifth Circuit's structural analysis of the San Jacinto Junior College. *Hander, supra; Goss, supra.* By comparing the two institutions, a clear picture of their similarities and differences develops.

Both Stephen F. Austin University and San Jacinto Junior vision makes it clear that revenue bonds issued pursuant Tex. Ed. Code § 61.059. The Coordinating Board controls and supervises to a limited degree certain aspects of both institutions. Tex. Ed. Code § 61.001 *et seq.* The Attorney [671] General of the State of Texas represents Stephen F. Austin State University and San Jacinto Junior College. Each institution is permitted to control locally generated funds from ten sources pursuant to Tex. Ed. Code § 51.002.

Some characteristics of San Jacinto Junior College as distinguished from Stephen F. Austin State University

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7. My distinguished brother, the Honorable William Wayne Justice, has reached the same decision with respect to the Eleventh Amendment immunity of Stephen F. Austin. Holding the University not an alter-ego of the State for the purpose of the Eleventh Amendment, Judge Justice did not have the benefit of the extent of the immunity testimony which the University brought in this case. Despite the University's failure to offer the same proof on the immunity issue in both cases, our holdings in this regard will be uniform. *Somberg v. Walker,* TY-75-325-CA (E.D. Tex. July 6, 1979). (unreported).

would seem to mitigate toward greater control of the junior college by the state. Notably, the junior colleges are controlled not only by the Coordinating Board, but they are also subject to a degree of supervision by the Central Education Agency. Junior College boards of regents are granted only such powers not vested in the Coordinating Board or the Central Education Agency. Tex. Ed. Code § 130.002. Additionally, the revenue bonding authority of junior colleges is not as extensive as the bonding authority of the senior colleges. Tex. Ed. Code § 55.18, 53.01 *et seq.*

These factors which favor a finding of immunity are counterbalanced by four factors. First, junior colleges are created by local initiative. Tex. Ed. Code § 130.031. Their governing bodies are elected by district vote rather than appointed by the Governor of the State of Texas. Tex. Ed. Code § 130.003(e). Most significant for immunity purposes is the fact that junior colleges have the power to levy ad valorem taxes. Tex. Ed. Code § 130.122. If the Court were restricted to these facts alone, a finding of immunity would follow.

However, Stephen F. Austin State University is possessed of certain characteristics which would encourage a finding of no immunity. The bonding authority of the University and other state senior colleges is more extensive than is the bonding authority of the junior colleges. Tex. Ed. Code §§ 53.01 & 55.18. Further, the bonding provision makes is clear that revenue bonds issued pursuant to the section are not general obligations of the State of Texas. *Id., supra.* Although the Board of Regents is appointed by the chief executive officer of the state, its power to act as the administrative body of the University

is more extensive. Powers specifically enumerated through §§ 95.21 and 101.41 include the power to acquire property in the name of the University and the power to make employment decisions irrespective of the state public employment scheme. With regard to locally generated revenue, the University and San Jacinto Junior College are granted the same powers of control. Tex. Ed. Code § 51 A. The importance of local revenue is underscored when the fact that the University generates approximately fifty percent of its own budget is considered.[8]

A finding of damages immunity for Stephen F. Austin State University will expand the Eleventh Amendment bar to the jurisdiction of the federal courts beyond its previously drawn parameters. *Edelman v. Jordan,* a suit against the Illinois state welfare department, was essentially a suit against the executive branch of the State of Illinois. *Ford Motor Co. v. Department of the Treasury* was a suit on a liability against the treasury of a state, again a part of the executive branch of a state government. In *Mt. Healthy v. Doyle,* the Supreme Court had

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8. A review of Dr. Haas' testimony is telling on the issue:

Q: . . . if you had a surplus in your locally generated funds, that's Stephen F. Austin's surplus, isn't it?

A: Yes, sir.

Q: Kept separate and apart from general funds received in the Treasury and no other college and no other Government entity can claim that money, can they?

A: That's correct.

* * *

Q: Now, is it true that these locally collected funds of a total of 18 million plus is in fact earmarked or tagged when it goes [to the State Treasury]—so that they are Stephen F. Austin funds, but it's just held by the State.

A: That's correct.

The testimony and Plaintiff's Exhibit 63-A establish that the amount of locally generated funds in the exclusive control of the university for the fiscal year ending July, 1979, was $18,451,320.17.

an opportunity to expand the scope of the Eleventh Amendment. The Court was reluctant to extend the bar to a recovery of damages against an entity which clearly did not fall within the executive, [672] legislative or judicial branch of a state government. This Court possesses the same reluctance.

The vindication of individual rights against governmental infringement may be the highest calling of the federal courts. The court is aware, and has not discounted the fact, that the Fourteenth Amendment has been rejected as a repealer of the Eleventh Amendment. *Jagnandam v. Giles,* 538 F.2d 1166 (5th Cir. 1976). The policy analysis the Court now engages in is not predicated on a view that the First and Fourteenth Amendments contravene the Eleventh Amendment. The Court is rather of the opinion that an expansion of Eleventh Amendment at the peril of meaningful redress of individual rights should not go without some reflection. The balancing of competing interests is common in the attempt to resolve conflicts between constitutional provisions. *Nebraska Press Association v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Gannett Co. v. DePasquale,* 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). In a case in which the defendant is not a branch *per se* of the state government and the structural analysis is close, the vindication of constitutional rights demands that the Court refrain from expanding the Eleventh Amendment beyond its previously defined scope.[9]

A further restriction on the Court's remedial powers contradicts the common law maxim, "For every right,

9. The Court notes that the Fifth Circuit refrained from expanding the Eleventh Amendment in both *Hander, supra;* and *Goss, supra.*

there is a remedy." The fundamental precept of remedial relief as it relates to our Constitutional system of government was addressed by Chief Justice Marshall:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection . . . The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for violation of a vested legal right.
> *Marbury v. Madison,* 5 U.S. 137, 168, 2 L.Ed. 60 (1803).

The question is no less dramatic when the choice is between a partial remedy and complete relief. A remedy for a vested legal right must be a full remedy; it must not rectify only a part of the loss.

Reinstatement would be a partial remedy. In the nature of injunctive relief, reinstatement would not be precluded by the Eleventh Amendment even if the Court were to find Stephen F. Austin State University an arm of the state for immunity purposes. *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Gay Student Services, supra.* In the absence of direct authority to the contrary and in recognition of the hybrid character of the institution in question, the Court reads the Eleventh Amendment narrowly in light of the articulated policy concerns.

The Court does not mean to suggest that the policy analysis it has engaged in would be appropriate in any Eleventh Amendment immunity question. The balancing

of interests should only be engaged in when the traditional structural analysis fails to yield a clear result. In matters of constitutional law which have extreme ramifications both to our public institutions and to individual rights, this Court will endeavor to assess the implications of its actions.

Therefore, the Court holds that Stephen F. Austin State University is not subject to Eleventh Amendment damages immunity. *Edelman v. Jordan, supra.* By a separate order contemporaneously entered with this memorandum opinion, back pay in the amount of $68,845.57 is awarded to Richard K. Hillis. Dr. Creighton Delaney is the only named individual defendant for whom good faith immunity is not available as a defense. *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

APPENDIX B

I. *Constitutional Provisions*

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 9

Rights retained by people.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. *Statutes.*

28 U.S.C. § 1343(3). *Civil rights and elective franchise.* The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . (3) to redress the deprivation, under color of State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. . . .

28 U.S.C. § 2072; Fed. R. Civ. P. 52(a). *Effect.* On all actions tried upon the facts without a jury, . . . the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses.

42 U.S.C. § 1983. *Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

III. *Regulations.*

Stephen F. Austin State University, Faculty Handbook, No. 7 (1973), pp. 18-20.

Grade Distribution

Departments should study their grade patterns after each semester for grade patterns should be kept within acceptable bounds. Grades should not, however, be forced arbitrarily into a normal distribution.

Throughout each course students should be kept aware of their grades. The final grade should be no surprise. To achieve student awareness, frequent testing, with the prompt return of carefully marked test papers, is strongly recommended.

The Vice President for Academic Affairs prepares each semester a study of student grade distribution by departments, and each department is responsible for the preparation of distributions for individual teachers. Occasionally a grade distribution study is made for individual teachers rather than for departments. . . .

Absences from Classes by Students

Since plass attendance is important, each faculty member is expected to encourage and require regular attendance to each of his classes. This fact should be made clear to students early in the semester. It is necessary for teachers to maintain careful daily attendance records, which must be accurately recorded in the Class Record Book.

The teacher is the final judge, in most instances, of class continuance on the part of a student enrolled in his classes. Students who are dropped from a class for poor attendance will ordinarily be assigned a grade of "F" in the course. Faculty members should assist students to make up work for absences which are excused up to a maximum of three weeks of a semester or one week of a summer term. . . .

Class Record Book

An accurate, understandable record of class performance and attendance must be kept on each student.

The class record for each semester or each academic year must be filed with the Department Head in accordance with his instructions.

When the individual faculty member terminates his employment with the University, his Class Record Book must be filed with the head of his department.

Records of class attendance will be called for by the Registrar at mid-semester and at the end of each semester and each summer term. The State Auditor's Office may call for the class record at any time. . . .

University Rules on Cheating and Plagarism

One of the most important objectives of teaching is the development of honesty in students. Throughout their educational program students should be impressed with the fact that cheating and plagiarism are morally degrading and that these practices seriously interfere with learning and intellectual development. It is a responsiblity of faculty members to make every effort (1) to inspire in their

students an appreciation of and a desire for honesty in academic work, (2) to prevent dishonesty and to protect the honest student, and (3) to take appropriate action in instances of dishonesty.

Cheating

Dishonesty of any kind with respect to examinations, written assignments, in or out of class, alteration of records, or illegal possession of examinations shall be considered cheating.

It is the responsibility of the student not only to abstain from cheating but, in addition, to avoid the appearance of cheating and to guard against making it possible for others to cheat. The student also should do everything possible to induce respect for the examining process and for honesty in the performance in the assigned tasks..

It is the responsibility of each faculty member to maintain the best possible conditions to prevent cheating in any manner. Each faculty member shall arrange for vigilant protection of all examinations and class exercises. He shall also employ every precaution to deny access to class records or examinations to anyone who is not entitled to such information.

IV. *Other.*

D. Robertson, "The Overprotected Professors," *Newsweek,* February 15, 1982, 17:

Let me introduce you to a lost generation. My friend Rob used to teach eighteenth-century French literature at a major university; he now builds redwood decks for California suburbanites. Ann, a linguist and a scholar, now works as a secretary in a computer firm. I followed a professional interest in medieval poetry and wound up cooking in a restaurant, for $4 and change an hour. Others of us drive taxis—the traditional occupation of exiles—or remain unemployed, dependent on spouses or family for support. We all have doctorates in the humanities. After spending a decade developing our careers, we are, on the whole, capable, hard-working people, with articles and books to our credit. Some of us are brilliant, some are less so. We have all been fired from universities that were unable to grant us tenure. We have lost not merely jobs, but whole livelihoods.

The tenure system means that after four or more years of graduate study and a six-year probation period, a university professor is either granted a lifetime contract or fired outright. There is no middle ground. The university must judge the performance of an individual in research and teaching over the first six years, and then make—or refuse to make—a salary commitment to him or her for the next 30. Small wonder that the decision is fraught with anxiety on all sides, and that mistakes are made: mediocrities are sometimes promoted, while productive people fall by the wayside.

Academic Freedom: The original purpose of tenure was to protect the faculty from political interference. Even today, no discussion of the system can take place without someone springing up to defend "academic freedom" against McCarthyism. Not that many professors have been out on the ideological battlefields of late. A lot else has changed since McCarthy's day. During the '60s, when funds were plentiful and teachers were scarce, eager administrators hired all candidates and promoted almost all to tenure. These people, now in their mid-40s, have populated the senior ranks of the universities for the last ten years; they will be with us for the next twenty, without fail.

In the meantime, we have seen an endless succession of budget cuts, and all expansion has stopped. No new positions are being created, whole programs and institutions are going under, yet tenure still protects the tenured —not from political interference, but from economic reality. In this time of widespread hardships, tenured faculty bear no share of the burdens. The truth is that the real value of their secure jobs has dramatically *increased*. Still they clamor for their customary raises and research subsidies. As far as I can tell, the dawn of any sense of responsibility is far away.

The university is now entering the second decade of what has been an unrelieved depression. This state of affairs does not merely reflect the fluctuations of the national economy. It is tempting to blame government and industry and the population trends and society at large, but the faculty must also acknowledge their own failure of stewardship and of vision.

If there is now no visible future in English or history, it is because the recent research in these fields has opened no new pathways. The famous "grade inflation" is another symptom of bankruptcy: we no longer believe in the intrinsic worth of the subject we are teaching. True, undergraduate education is now largely given over to processing pragmatic youngsters on their way to business and medical schools. These kids can be taught to read Shakespeare, but only if you guarantee them an "A" in advance. The graduate students, those who wish to continue reading Shakespeare, are even more demoralizing to teach. Poorly advised to begin with, most have no prospects in academia, and they often stay on in degree programs simply because they are unable to face the "outside" world or make realistic career decisions. And still new Ph.D.'s are conferred each year, swelling the ranks of the lost generation.

A few will indeed find jobs. There are still some "tenure track" positions open to the inexperienced and industrious graduate, although the odds against one are usually higher than 100 to 1. Once miraculously hired, the young teacher will be kept busy with elementary instruction, advising and administrative chores. Six years later, with a few articles out and a book typically awaiting publication, this person will offer little resistance to being fired and replaced by a new beginner.

Victims: And if one is actually promoted, what awaits? Tenure used to be the springboard to continuing, intense production. The rewards included not merely an eventual full professorship, but also—more important—a movement to progressively better schools, brighter students and more brilliant colleagues. Now almost no one is moving,

and tenure has become the whole objective, the end of all intellectual growth. It is well known that without pressure, positive or negative stimulus, many people fall silent, teach their six hours a week and putter with house repairs, cooking classes or racquetball for the rest of their days. But it is all too easy to denounce the deadwood lumber yard. These people are as much victims of the academic depression as the rest of us, and their number increases every year.

The teaching profession in the humanities is now gridlocked—"tenured in," as they say—up to 100 percent. Everybody concedes that this is a disaster. But so far, professors have refused to face the inevitable conclusion, which is that the tenure system itself is long overdue for reappraisal. The wholesale waste of intellectual resources must not simply be allowed to continue for the next twenty years, or until the present generation of senior faculty dies out or comes to its senses. At the present, difficult time, the professor's "academic freedom" from all job insecurity places an insupportable economic burden on the rest of us. There is a growing army of embittered, unemployable intellectuals in our midst. The whole phenomenon insults dearly held national values: can so much intelligence, hard work and dedication be so little valued today? It is time now to recognize the potential threat to society within this actual human tragedy and respond.

Robertson teaches French at the University of California, Santa Cruz.

J. Underwood, "Student-Athletes: The Shame, The Sham," *Sports Illustrated,* May 19, 1980, at 38-39:

This is the spoor of an educational system gone mad: *Nov. 15, 1979: Eight* Arizona State football players were declared ineligible because they received credit for an extension course. Remediation of Reading, Mathematics and Language for the Exceptional Child, taught during the summer of 1979 in Gardena, Calif. under the auspices of Rocky Mountain College of Billings, Mont. The players neither attended any classes in the course nor completed any of the work required. Arizona State forfeited the five victories in which the eight had participated and Athletic Director Dr. Fred Miller was subsequently fired.

Nov. 19: The NCAA informed San Jose State that a Spartan football player, senior Guard Steve Hart, might be academically ineligible. San Jose investigated the allegation and found that Hart had, indeed, claimed credit falsely for two courses in the Rocky Mountain program. San Jose, the PCAA co-champion, forfeited two victories, a tie and the conference title. . . .

Dec. 4: Twenty-eight athletes at the University of Southern California, including 19 players on USC's Rose Bowl-bound football team, were found to be enrolled in—but not attending—Speech Communications 380, a course supposedly open only to members of the debating team. The speech instructor resigned: the athletic department's academic co-ordinator was suspended; and the athletes were given a five-day "crash course." After the university reviewed the work done in the crash course, 26 of the athletes were ordered to take a second makeup, "because," said USC President John R. Hubbard, "of irregularities

discovered in the conduct of the first makeup." Among the irregularaties was the submission by some student-athletes of work that was not their own. . . .

Dec. 22: Immediately before the University of Utah basketball team's 71-69 upset of national champion-to-be Louisville, Coach Jerry Pimm was informed by Dr. R. J. Snow, the school's vice-president, that the Utes' star forward, Danny Vranes, had received credit for the Ottawa University extension course in Sepulveda. Despite Vranes' assertion that he had been given permission to take the course by correspondence and to not attend any classes, Utah ruled Vranes ineligible.

Dec 24: Oregon State University announced that football player Leroy Edwards, who had taken the Ottawa extension course but never claimed credit for it, was still found to be ineligible because he had failed in a summer course in general biology at Central Florida Community College in Ocala. Oregon State had one win to forfeit.

Jan. 17, 1980: California State Polytechnic at Pomona, announced that it had volunteered to forfeit all three of its football victories and offered to do the same with its 16 dual-meet cross-country wins after two athletes—runner Mark Turner and Defensive Back Henry Wilson—admitted to having received credit for classes they never attended in the Rocky Mountain College extension course. Further investigation revealed that Reserve Center Kenneth Barrance, a Cal Poly basketball player, was also academically inelligible. He too had never attended the Rocky Mountain course for which he had been registered. Cal Poly thus forfeited eight basketball victories as well.

Jan. 23: Dr. Arthur G. Hansen, president of Purdue, announced that the university had suspended Defensive Back David Anthony Hill because records submitted to Purdue before Hill transferred there from Pasadena City College gave him credit for courses that he acknowledged he had never attended, namely, the Rocky Mountain course and others offered by Pacific Christian Junior College in Fullerton, Calif.

Feb. 14: University of Oregon President William B. Boyd announced that seven Oregon student-athletes were known to have received credit for courses for which they did no work. Four football players had received unearned credit for the Ottawa University extension course, two swimmers had received unearned credit from Pacific Christian College and Derrick Dale, a former linebacker, had earned instant eligibility in the early fall of 1978 by "taking," as independent study, a jogging course at nearby Lane Community College. Dale was credited for running he had already done in football practice. Boyd fined the head football coach, four of his assistants and the swimming coach more than $9,000 for their involvement in the scheme.

Feb. 16: The *Los Angeles Times* reported that several former athletes at UCLA had been credited with attending a course at Los Angeles Valley College that they hadn't actually attended.

March 10: The *L.A. Times* reported that USC's Billy Mullins, the NCAA 400-meter champion in 1978, had been accepted as a transfer student at Southern Cal in the spring of 1978 largely on the basis of a transcript that included 28 credits he purportedly had received in the fall of 1977 from four different community colleges located in the Los Angeles area—Pasadena, Los Angeles, West Los Angeles and Rio Hondo. According to the *Times,* Mullins' schedule would have required that he be at Rio Hondo at 8 a.m. for Economics 1A, 20 miles away at Pasadena at 9 a.m. for Chemistry 22, and back at Rio Hondo at 10 a.m. for Literature 1B.

Opposition

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NO. 81-1900

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

RICHARD E. HILLIS

Petitioner

V.

STEPHEN F. AUSTIN STATE UNIVERSITY
and
CREIGHTON DELANEY,

Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a department chairman has the authority to determine what advance placement will be granted to a student who enrolls in the department, direct a professor to carry the student on his class roll and to enter a grade based on the chairman's evaluation of the student's work in order to give effect to the chairman's advanced placement decision.

2. Whether a United States Court of Appeals, after hearing oral arguments on a sufficiency of evidence point previously unassigned as error by appellants, and after appellants requested permission to submit supplemental briefs on the sufficiency of evidence point, may allow appellants and appellees to submit supplemental briefs on the sufficiency of evidence question.

3. Whether the Court of Appeals may, in applying the clearly erroneous standard to the trial court record, reverse the district court's findings, where statements were attributed by the district court to the wrong individuals and where impoortant corroborative and uncontradicted testimony was ignored by the district court and the district court's only credibility finding was based on lack of corroboration where the record clearly showed corroborating testimony.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INDEX OF AUTHORITIES iii

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

OPINIONS BELOW 4

REASONS FOR REFUSING THE WRIT 4

CONCLUSION 15

INDEX OF AUTHORITIES

CASES Page

Garza v. Rodriguez, 559 F.2d 259 (5th Cir. 1977), *cert. den.*, 439 U.S. 877 (1978) 9

Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303, 1306, n.1 (9th Cir. 1970) 11

Harris v. Smith, 372 F.2d 806, 815 (8th Cir. 1967) . . . 11

Hochstadt v. Worcester Foundation, Etc., 545 F.2d 222 (1st Cir. 1976) 9

Lindsey v. Bd. of Regents of Univ., Etc., 607 F.2d 672 (5th Cir. 1979) 9

McDougall v. Dunn, 468 F.2d 468, 476 (4th Cir. 1972) 12

Megill v. Board of Regents of State of Florida, 541 F.2d 1073 (5th Cir. 1976) 9

Montgomery v. Marva Theaters, 218 F.2d 221 (4th Cir. 1954) 11

Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977) 6,7

Nowell v. Dick, 413 F.2d 1204 (5th Cir. 1969) 11

Platis v. United States, 409 F.2d 1009 (10th Cir. 1969) 11

Stanley Educational Methods v. Becker C.P.A. Review, 539 F.2d 393 (5th Cir. 1976) 11

U.S. v. Arnold, Schwinn & Co., 388 U.S. 365, 371, n.4 (1967) 11

Vachon v. New Hampshire, 414 U.S. 478 (1974) 11

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Stephen F. Austin State University and Creighton Delaney, in response to the Petition for Writ of Certiorari submit this Brief in Opposition.

JURISDICTION

Petitioner incorrectly invokes jurisdiction pursuant to the Rules of the Supreme Court of the United States, in-

cluding Rule 17 (a); because the Court of Appeals below decided the issues in accord with precedent.

The judgment of the Court of Appeals (Petition for Writ A.2) was signed on January 11,1982. Petition for rehearing en banc was denied on February 4,1982 (Petition for Writ A.1). Petitioner alleged jurisdiction pursuant to 28 U.S.C. §1331, 42 U.S.C. §1983,28 I.S.C. §1343(3), Amendments I, IX, and XIV of the United States Constitution.

CONSTITUTIONAL PROVISIONS

Petitioner claims the First, Ninth, and Fourteenth Amendments of the United States Constitution are involved.

STATEMENT OF THE CASE

Petitioner Richard K. Hillis was hired as a nontenured assistant professor of Art at Stephen F. Austin State University beginning on August 23,1974. It is difficult to find any basis in the record for Petitioner's assertions that SFA Art Department was in a period of transition from "teachers college" to a "major university," or that Dr. Hillis' hiring was tied to this transition, or the trial court's assertion that Hillis was part of the "new wave" in the Art Department. At the beginning of the fall semester Hillis received a note from his department chairman, Dr. Creighton Delaney, telling him that Miss Kelly Perkins had received advanced placement credit for Art 300-01 and directly ordering Hillis to carry Miss Perkins on his class roll for that course with a grade of "B."

During the entire fall, Hillis failed to avail himself of any avenues to question the order. In fact, Hillis himself testified to only one attempt to see Dr. Delaney, at which time he apparently failed to leave a message.

There was no testimony, as Petitioner asserts, that students were "lured" to the Art Department by promising course credit to students who did not demonstrate proficiency or completed work. The record established that advanced placement credit was granted "informally" through department chairmen. Dr. Delaney and Miss Perkins testified that he had examined her art portfolio. Further, the record shows that Dr. Delaney granted Miss Perkins advanced placement on the strength of her "advertising portfolio," which contained paintings, and not on a "collage making class" at Skyline High School in Dallas.

The record clearly shows that contrary to Petitioner's assertion, the trouble with Dr. Hillis began long before the "grading incident" and in fact commenced at the beginning of his employment with Hillis' refusal to fill out government W-2 forms.

Beginning in late November or early December, Dr. Delaney and Dean Turner, Dean of Fine Arts, began discussions concerning whether or not to renew Hillis' contract.

Based upon their experiences with Hillis' "constant bickering," his "abusive" nature, "his abrasiveness," his uncooperativeness, and reports that Hillis "was rather disruptive," the decision not to renew Hillis was made at least by early December.

Hillis' refusal to comply with the directive came subsequent to the nonrenewal decision and thus did not enter into the decision at all originally. Hillis waited until grading time at the end of the semester to protest the Perkins directive, long after Dr. Delaney felt committed to the student. At the December meeting between Hillis and Dr. Delaney, according to Hillis' testimony, an agreement for Hillis to review Kelly Perkins' portfolio was reached. No further protests were made until

sometime in late January, long after the nonrenewal decision had been made.

It is clear then that no other protests about the Perkins incident would have been made until late January or early February since at least in Hillis' mind an agreement had been reached and thus there was nothing to protest. There is no testimony in the record to demonstrate anything to the contrary.

All other protests or other forms of protected speech which occurred after the December decision not to renew Hillis' contract are irrelevant since they could not possibly have formed the basis for the decision, except to the extent that they may be further evidence of the character traits which formed the basis for the decision.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Texas, is reported at 486 F. Supp. 663 (E.D. Tex.1980) and is reproduced in the Appendix to the Petition for Writ of Certiorari, pages A13-A32. The opinion of the Court of Appeals for the Fifth Circuit is reported at 665 F.2d 547 (5th Cir. 1982 and is reproduced in the Appendix to the Petition for Writ of Certiorari, pages A2-A12.

REASONS FOR REFUSING THE WRIT

I. The Court of Appeals properly comported with the accepted and usual course of judicial proceedings.

1.) The Court of Appeals properly found the District Court's findings to be clearly erroneous. Petitioner may not insulate obvious and dispositive misstatements of crucial portions of the record and the absolute ignoring of other large portions thereof by a trial court under the rubric of "credibility."

The trial court made only one finding concerning the credibility or veracity of witnesses. This related to Dr. Delaney's testimony that the decision not to renew Hillis was made in late November or early December. The trial court termed this testimony "not worthy of belief insofar as it is uncorroborated..." (r.4). However, as a unanimous three judge panel for the Court of Appeals pointed out, the timing of the nonrenewal decision, as well as the supporting reasons, were corroborated in full by Dean Turner.[1] Both Dean Turner and Dr. Delaney explained the delay in notification as resulting from the activities at the close of the fall semester and the start of the spring semester. Clearly the trial court erred in characterizing the testimony as uncorroborated, where it was in fact corroborated in full.

The Court of Appeals properly found clear error where the district court, relying exclusively on its quotation of Dr. Delaney that the "Perkins matter was not 'insignificant' in the nonrenewal decision,"[2] found that the protected activities were a substantial motivating factor. However, Dr. Delaney's testimony was the exact opposite. Dr. Delaney testified that he had several discussions with Dean Turner about Hillis. The decision not to renew him was made in late November or December. Under questioning by the court, Dr. Delaney stated that the Perkins matter

> had no effect on our decision, not originally, or any—it had no effect on our decision to not continue his employment.

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1. Petitioner conceded in his original Appellee's brief to the Fifth Circuit that Delaney had already made his decision not to recommend Hillis for renewal by early December.

2. Later in the opinion the quote becomes "not insubstantial," as opposed to Petitioner's assertion that it was a "substantial factor."

Obviously, since the discussions commenced at least by early December and Hillis' refusal to comply with the directive was later, it did not enter into the decision at all originally. It was later discussed only as an example of his lack of cooperation.

No one testified that the incident itself rather than Dr. Hillis' character traits played any part in the decision. Dr. Delaney stated that his decision was based upon Hillis' "constant bickering," his "abusive" nature and his uncooperativeness. Dean Turner, retired from Stephen F. Austin at the time of trial and Dean of Fine Arts in 1974—75, testified that his decision was based upon reports that Dr. Hillis "was rather disruptive," "was abrasive with the secretary" and that "the department was in a little trouble because of his presence, his abrasiveness."

Accordingly, the Fifth Circuit properly found the district court's finding of causation, resting upon nonexistent testimony, to be clearly erroneous. There was no evidence that, after the mountain of ill feelings built by Dr. Hillis, any protected facets of the Perkins incident had anything to do with the decision. In fact, there was no evidence that the incident, other than as yet another example of Dr. Hillis' character traits, played any part at all. Thus Petitioner failed to establish by a preponderance of the evidence that any exercise of his constitutional rights was a motivating or substantial factor in his nonrenewal.

Further, it cannot be seriously questioned that Dr. Hillis would not have been renewed without the Perkins incident. Once again, what evidence is there that Stephen F. Austin had any reason to keep him? By restricting its view to the disruptive effect of Dr. Hillis' minimal First Amendment activities, the district court ignored the thrust of defendants' case and reached a clearly erroneous finding. *Mt. Healthy City Board of*

Ed. v. Doyle, 429 U.S. 274 (1977) was clearly intended to avoid just this result.[3]

The Court of Appeals properly held that trial court clearly erred in its factual findings under *Mt. Healthy* since defendants clearly established by a preponderance of the evidence that Dr. Hillis would not have been renewed even in the absence of protected conduct. This determination was made, not on a reappraisal of witness credibility or reweighing of the evidence, but as a result of the trial court's completely ignoring uncontradicted testimony.

The trial court stated that other than the grading incident the only other evidence of Hillis' uncooperative conduct was his refusal to comply with university procedures in the acquisition of a light bulb. Contrary to Petitioner's assertions that only "vague" and "conclusory" accusations concerning Hillis' conduct were made, there were numerous specifically recited instances.

Dr. Delaney testified to three separate instances of Dr. Hillis' abusiveness and lack of cooperation. First was Dr. Hillis' refusal to fill out Government W-2 forms, saying it was "nonsense." Second was an incident where Dr. Hillis adamantly insisted he must have blueprint paper for one of his classes. Dr. Delaney located a source in Lufkin. Hillis agreed to pick it up, but persisted in complaining until Delaney finally traveled to Lufkin to get the blueprint paper. Yet Delaney noticed that Hillis did not use the paper until several weeks later. Third was Dr. Hillis' refusal to

3. One can't take seriously Petitioner's claim that Respondent's brief an unassigned point of error without permission from the court by applying the Mt. Healthy analysis in determining the sufficiency of evidence since they properly contend this is the correct legal standard.

follow university requisition procedures in obtaining a light bulb for use in his own personal projector. The procedures had been explained to him and yet he harangued and berated the department secretary when she tried to explain that the reason she could not reimburse him was because of specific university acquisition procedures.

The secretary involved, Ms. Ann Turner, who was employed elsewhere at the time of trial and had not worked at Stephen F. Austin for four years, testified that Dr. Hillis caused her trauma several times "to the point of crying." Dr. Hillis went into a "real rage" and "just had a fit most every time (she) tried to explain department policy to him or University policy." His "filthy" language "was the thing that offended (her) so much."

Dr. W.K. Waters, a professor of theatre who served with Dr. Hillis on a review committee for faculty research grant proposals, testified to an incident where Dr. Hillis made an "attack on the scholarship and scholarly ability" of Dr. Towns, a grant proponent. Dr. Waters felt that the attack was humiliating and later apologized to Dr. Towns for it. Dr. Towns reported the incident to Dr. Delaney.

Dr. Diane Ford, an art education professor who had been with the department for 12 years, recounted an incident in the office where Dr. Hillis embarrassed her in front of students by shouting about the incompetency of the graduate program and that Stephen F. Austin's "graduate students were not as competent as college sophomores elsewhere."[4]

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4. Petitioner implies that the Court of Appeals confused the identity of Dr. "Dionne" Ford with Diane Ford, a librarian. There is no such person as Dr. "Dionne" Ford. She is identified in the transcript and each of the briefs submitted by both Peitioners and

(footnote continued on following page)

Neither the general nor the specific testimony of the nonparty witnesses was impeached or contradicted. Dr. Hillis presented no independent witnesses to rebut the general characterization that he was abusive, disruptive and profane nor to testify to any counterbalancing merits on his part.

The Court of Appeals properly held that any finding other than that Dr. Hillis was abusive, profane and disruptive would be clearly erroneous on this record. The lower court did not even acknowledge the existence of this evidence and failed to make such a finding. Thus, the balance of its findings are tainted.[5] Indeed, on these facts, the obvious question is: why would Stephen F. Austin want to keep Dr. Hillis when they can choose from two or three hundred applicants for a replacement? The constitution does not preclude a state employer from not renewing an employee because of abusive personality traits. *Garza v. Rodriguez*, 559 F.2d 259 (5th Cir. 1977), cert. den., 439 U.S. 877 (1978); *Megill v. Board of Regents of State of Florida*, 541 F.2d 1073 (5th Cir. 1976). See, *Lindsey v. Bd. of Regents of Univ., Etc.*, 607 F.2d 672 (5th Cir. 1979); *Hochstadt v. Worcester Foundation, Etc.*, 545 F. 2d 222 (1st Cir. 1976). The record was easily strong enough for the unanimous appellate panel to rule that any finding other than one which recognizes that Dr.

(footnote continued from previous page)

Respondents as Diane Ford. Petitioner's assertion that she was called as an expert witness is untrue. Dr. Ford was called to testify about her personal expewriences with Dr. Hillis' unprofessional conduct. Excusable is the Fifth Circuit's label "library staff person" since Dr. Ford testified she was the library liaison for the department.

5. While the district court discussed the disruptiveness claim of defendants, the discussion was limited to any disruptive effect of plaintiff's exercise of First Amendment rights. However, defendants' evidence is that Dr. Hillis' character traits, independent of any exercise of constitutional rights, were unsatisfactory.

Hillis would not have been retained regardless of the Perkins incident was clearly erroneous. Their finding was reached as a result of ignored uncontradicted testimony and statements attributed to the wrong persons. It would be an exercise in futility to have nine more individuals examine the record only to affirm a unanimous 3 judge appellate panel on the facts.

2) The Fifth Circuit's method of review was unbiased and within the court's authority and discretion.

First, one would think that before a party accuses an appellate panel of "methods of review so irregular as to indicate bias," that party would get his facts right. Both in the reply brief filed by Appellee to Appellants' supplemental brief, in the Petition for Rehearing En Banc, and now in a Petition for Writ of Certiorari, Dr. Hillis' representatives claim that the chief judge, *sua sponte,* brought up the issue of the sufficiency of the evidence and "ordered the Attorney General to assign such error and to write a new brief...." They also allege that Appellants made no motion or application for leave to amend. It is absolutely flabbergasting that such contentions are still seriously pressed. One would think that these representatives were not present at oral argument although they were, at least in body. Reference to the tape of oral argument will show that the Attorney General began his argument by expressing dismay at the omission of this central issue from the briefs, gave two glaring examples of the district court's clearly erroneous misstatement of the record and supplicated as best he knew how for the opportunity to brief the evidentiary issue on behalf of his client, Dr. Delaney. Thankfully the Court exercised its

discretion and allowed the supplemental brief.[6] That this was in the interest of justice is demonstrated by the Court's unanimouns agreement that the evidence did not support the judgment.

Clearly the Court had inherent authority and discretion to permit Appellants—Respondents to raise this issue at argument and file the supplemental brief. Ironically, the Court could have, with absolute propriety, done exactly what petitioner inexcusably incorrectly asserts was done. Rule 28 (c), Federal Rules of Appellate Procedure, expressly recognizes the power of the Court to allow further briefing. In fact, the Court may, in its discretion, decide an appeal on the basis of an issue which was never briefed or argued or even presented to the trial court.[7] *Nowell v. Dick*, 413 F. 2d 1204 (5th Cir. 1969). Nor does this case stand alone. See, *Vachon v. New Hampshire*, 414 U.S. 478 (1974), *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365, 371, n. 4 (1967), *Stanley Educational Methods v. Becker C.P.A. Review*, 539 F. 2d 393 (5th Cir. 1976), *Gebhard v. S.S. Hawaiian Legislator*, 425 F. 2d 1303, 1306, n. 1 (9th Cir.1970), *Platis v. United States*, 409 F.2d 1009(10th Cir. 1969); *Harris v. Smith*, 372 F.2d 806, 815 (8th Cir. 1967), *Montgomery v. Marva Theaters*, 218 F.2d 221 (4th Cir. 1954). While the failure to address the issue in Appellants—Respondents' initial brief is hardly a practice to be emulated, the Court is a court and may act in the interests of justice as it did here.

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6. It may be noted that Appellants—Respondents filed this brief in a timely manner and that the extension of time requested by Appellee—Petitioner was unopposed and granted. In fact, Appellants—Respondents loaned Appellee—Petitioner a copy of the transcript for use in preparation of their reply.

7. Since the very essence of a trial court's function is to evaluate the evidence and adjudicate the case on that basis, it can hardly be asserted, and even Petitioner does not, that the matter was not before the trial court.

> Appellate Courts are not, though, powerless to correct errors in the trial, even if not raised by appeal, 'where injustice might otherwise result. Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.'[Citations omitted.]

McDougall v. Dunn, 468 F.2d 468, 476 (4th Cir. 1972). The only "prejudice" which could be claimed by Appellee is that justice was served and he properly lost a case he should never have won. Having had a full opportunity to present his arguments on the evidentiary issue, he has not a leg to stand on.

Additionally, Petitioner does this court a disservice in accusing the Fifth Circuit of bias by misquoting the court's opinion. Petitioner implies that the Fifth Circuit based their decision upon the existence of a university advanced placement policy of which they had earlier stated "Our resolution of this case does not hinge on whether an advanced placement policy existed at SFA." See Appendix A to Petition page A3. Petitioner then goes on to "quote" from the opinion and asserts the panel actually found Hillis' actions to be "plain insubordination" to "SFA policy." An examination of the passage referred to, the last paragraph on page A5 of Appendix A to the Petition, shows no mention of "SFA policy."

The claim is also made that the Fifth Circuit based their finding that none of Hillis' First Amendment rights were violated in part, on findings by the

AAUP. This is not true. The findings of the AAUP were discussed in connection with Hillis' procedural due process claims. See Appendix A of Petition, page A11, first paragraph.

II. Petitioner's Writ should be denied because the Court of Appeals decided those questions of federal law in accordance with the precedents of this court.

Reasons II and III in the Petition for Writ of Certiorari are based on a fallacy. Both reasons assume that the principle involved here is the right of a professor to exercise his/her academic freedom in evaluating students enrolled in his/her class. That issue is not presented in this case. The "grading dispute" here involved the right of a department chairman to exercise his authority and his academic freedom to evaluate a student's work and award advanced placement. The advanced placement decision is a decision between the school and the student. Here the administrative decision to award advanced placement was made by the Art Department Chairman. Advanced placement is not a decision which an individual professor had the authority to make or to usurp.

Petitioner characterizes his refusal to honor the department directive as an objection to an infringement on Hillis' right to determine the content and method of his teaching. The claim is without foundation. Hillis' right to determine the content and method of his classes was unsuppressed. He was free to communicate with all those enrolled in the class and to determine the ultimate grade for all those who were enrolled and who had not demonstrated such proficiency or completion of other course work as would merit advanced placement. The decision to award Kelly Perkins advanced placement by the department chairman was an exercise of his academic freedom, to evaluate the students who enrolled in the department. Advanced placement was awarded

to Kelly Perkins on the strength of her art portfolio. Since the school charged tuition for hours awarded, obviously the student must be enrolled in the proper class. There is nothing improper about such a process.

There is a fatal inconsistency in plaintiff's claim of an absolute right to evaluate and grade on his part and his criticism of Dr. Delaney's evaluation of Ms. Perkins' work and refusal to abide by Dr. Delaney's decision. This attitude of denying Dr. Delaney the very right which plaintiff so vehemently claims for himself is indicative of the personality traits which caused his nonrenewal.

Clearly, then, the questions of academic freedom to grade or to determine the content or method of a course are not presented in this case. The question involves the authority of a department chairman to award advanced placement to a student in accord with informal university policies.

The larger questions of academic freedom to grade and the parameters of First Amendment protection of academic freedom are not presented in this case since the issue involved is the propriety under local policies of an award of advanced placement. At best the case is of precedential value only in determining whether the award of advanced placement was proper in accordance with the policies of Stephen F. Austin State University.

Since the Fifth Circuit held that no protected First Amendment activities played any part in the nonrenewal decision, before the question of academic freedom could even conceivably be reached, the court would have to find the Fifth Circuit was wrong in finding the trial court's decision was clearly erroneous.

CONCLUSION

For the reasons advanced above, the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served by depositing same in the United States Mail, certified, return receipt requested addressed to Ms. Martha McCabe, P.O. Box 1115, Tyler, Texas 75710 and to Mr. Thomas J. Griffith, 1208 Thirteenth Street, Lubbock, Texas 79401 on this _____ day of May, 1982.

LONNY F. ZWIENER